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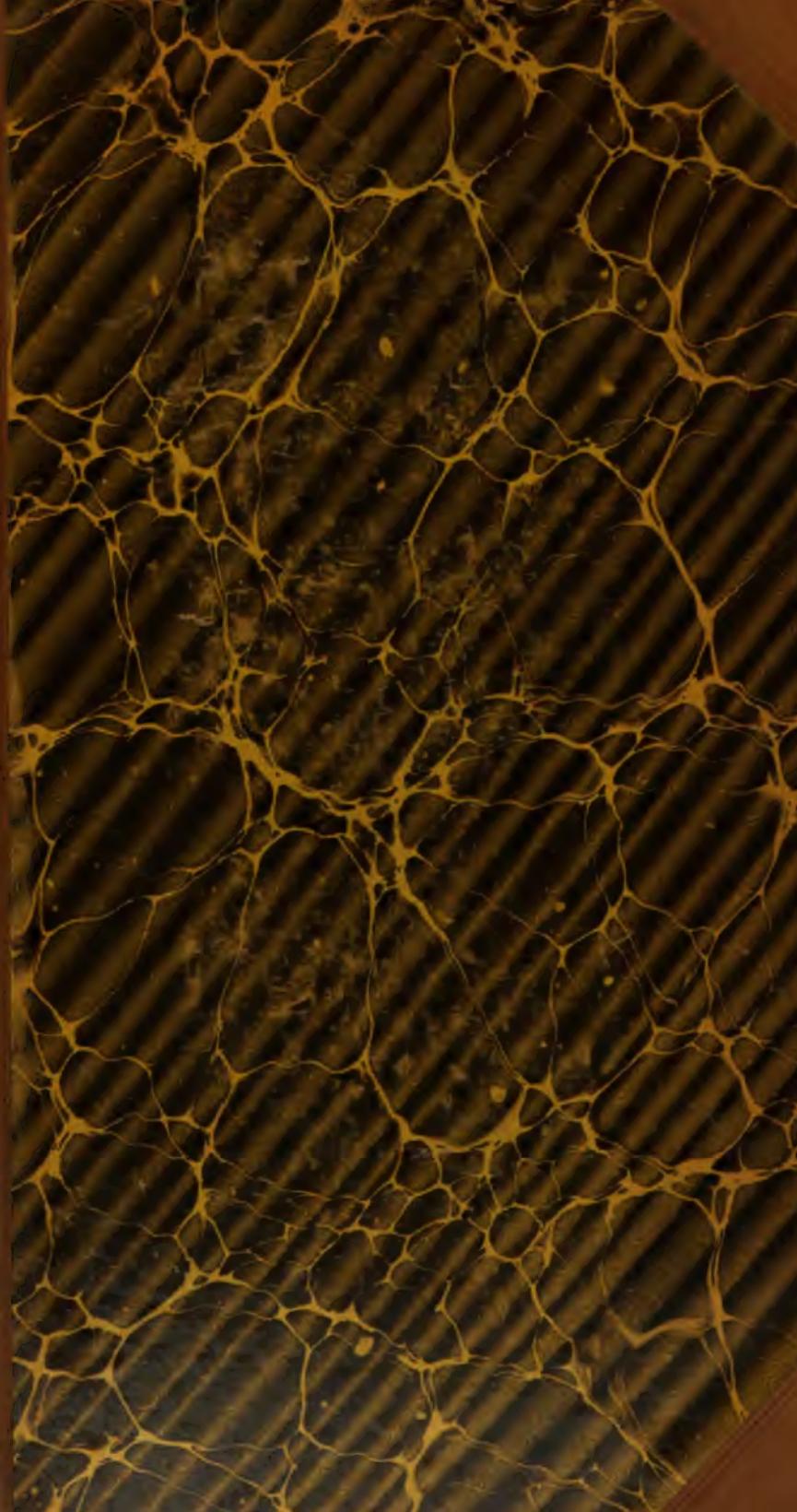
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LOWER-CANADA

REPORTS.

~~~~~ J. 163

## **DÉCISIONS DES TRIBUNAUX**

**DU**

**B A S - C A N A D A .**

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**RÉDACTEURS: MM. LELIEVRE ET ANGERS.**

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**COLLABORATEURS À MONTREAL: MM. BEAUDRY ET ROBERTSON.**

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**VOLUME V.**

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**1855.**

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# LOWER-CANADA REPORTS.

## DÉCISIONS DES TRIBUNAUX DU BAS-CANADA.

BANC DE LA REINE, } DISTRICT DE QUEBEC.  
EN APPEL.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef,  
PANET, AYLWIN et C. MONDELET, Juges.

{ RICHARD, (Demandeur,) Appelant,  
et  
{ LES CURÉ ET MARGUILLIERS de l'Œuvre  
et Fabrique de Québec, (Défendeurs,) Intimés.

Jugé :—Que la clause dans un bail d'un banc dans une église, par laquelle clause il est stipulé qu'à défaut du paiement du loyer aux termes et époques fixées, dès lors et à l'expiration des dits termes le dit bail sera et demeurera nul et résolu de plein droit, et que le bailleur rentrera en possession du dit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans être tenu de donner aucun avis ou assignation au preneur, n'est pas une clause qui doit être réputée comminatoire, mais qui doit avoir son effet.

Held :—That the covenant in the lease of a pew in a church, by which covenant it is agreed that in default of payment of the rent to accrue at the period fixed by the lease, such lease will immediately become null and void and of no effect, and that it will be lawful to the lessors, forthwith to take possession of the pew leased, and to proceed to relet the same, without being bound to give any notice thereof to the lessee, is not a covenant which will be regarded as a *clause comminatoire*, but is a covenant the execution of which will be enforced.

Jugement rendu le 30 Septembre, 1854.

Le Demandeur alléguait par sa déclaration que par acte notarié, fait à Québec, le 13 Juin, 1852, la Fabrique de Québec par l'entremise du Marguillier alors en charge, le Demandeur s'étant rendu adjudicataire d'un Banc d'Eglise, lui avait loué et affermé le dit banc, dans l'église du faubourg St. Jean de Québec, pour le terme de trois années qui finiraient le 30 Juillet, 1855, aux charges, clauses et conditions énoncées au dit bail.

Que ce bail avait eu son exécution, et que le Demandeur en vertu d'icelui avait pris possession du dit banc, et en avait joui jusqu'au 8 Juillet, 1853, à laquelle époque les Défendeurs avaient dépossédé le Demandeur du dit banc et l'avait empêché d'un jouir.

Que le 15 Décembre, 1852, le Défendeur avait payé le second terme de son bail, et que le 28 Juin, 1853, il avait offert la somme due pour les premiers six mois de la seconde année,—qu'il réitérait cette offre et qu'il faisait dépôt du montant offert.

A cette action les Défendeurs plaiderent par exception, que par le bail allégué par le Demandeur il avait été spécialement stipulé qu'à défaut du paiement du dit loyer, aux divers termes et époques y fixées, dès lors et aussitôt après l'expiration d'aucun des dits termes, le dit bail serait et demeurerait nul et résolu de plein droit, et que la dite Fabrique rentrerait en possession du dit banc, et pourrait procéder à une nouvelle adjudication d'icelui sans être tenue de donner aucun avis ou assignation au dit preneur.

Que le Demandeur avait fait défaut de payer ce loyer tel que convenu par le dit bail, et qu'en vertu de la clause ci-dessus alléguée les Défendeurs avaient repris possession du dit banc, et l'avait depuis loué et affermé, de la manière accoutumée, à une autre personne.

Les parties ayant respectivement fait leurs preuves, furent entendues aux mérites.

DUVAL, Justice : The question submitted to the Court in this cause arises out of a clause in the lease by the Defendants to the Plaintiff, which is to the effect that upon default of payment of the rent to accrue, at the period fixed by the lease, the lease will, immediately after the expiration of such period, become and be null and void and of no effect,

and that it will be lawful to the lessors forthwith to take possession of the pew leased and proceed to relet the same, without being bound to give any notice whatever to the lessee.

The rule, in relation to this matter, is that parties to contracts have a right to insert in such contracts all clauses or conditions which are not *contrà bonos mores*, or against law, such being the rule it is difficult to understand, as it has been pretended by the Plaintiff, why this covenant should not be enforced.

It is said that this covenant is what in our Jurisprudence is called a *clause comminatoire*, at this day the doctrine in relation to *clauses comminatoires* is not admitted in Courts of Justice. The interests of commerce, and in truth the interests of parties generally, require that contracts should be, and they are, enforced as they are entered into, without the delays which it was discretionary with Courts of Justice to grant to parties who neglect to fulfil their contracts, if in our day it were otherwise, the Legislature of the country would be bound to interfere, and prevent our Courts of Law from varying the contracts entered into by parties, or rather of making contracts for them. (1) Lord Kenyon has truly said, that Courts of Justice sit not to make contracts, but to enforce the execution of contracts entered into by parties.

It has been contended on behalf of the Plaintiff that the Fabrique, the Defendants, had been guilty of a *voie de fait* in taking possession of the pew leased to the Plaintiff, upon its own authority, and without the Judgment of a Court annulling the contract under which he was in possession. It is to be remarked that this is not the case of a man in possession of a house, the Plaintiff only uses the pew on Sundays and holidays, here the pew is leased to him upon the express

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(1) 6 Toullier, Nos. 245, 550.—Merlin, Rep. vbo. Emphytéose, §3, p. 268:—Merlin, Rep. vbo. Clause Communatoire:—Guyot, Rep. de Jurisp. vbo. Communatoire, pp. 79 et 80:—L. C. Den. vbo. Clause Communatoire.

condition that he shall retain the same so long only as he shall pay the rent, failing which it shall be in the power of the lessors to take possession of the pew, he fails to make payment of the stipulated rent, the Defendants, as they are authorized to do under the contract, take possession, and I think they are right. Upon what pretence can the Plaintiff feel himself authorized to retain possession of the pew if he fails to pay the rent? If he took possession of the pew and went into it without having paid the rent, he would be the trespasser committing the *voie de fait*. (1)

MEREDITH, Justice : According to the Jurisprudence which existed in France before the Code Civile, the Courts would, I think, have held the resolutive clause, *clause résolutive*, in the case before us, to be comminatory, and would not have allowed it to have the effect of annulling the lease, without the aid of judicial authority.

Toullier describes the old french Jurisprudence on this subject in the following words :

“ Les clauses par lesquelles il était convenu qu’un acte “ demeurerait nul et résolu, dans le cas où l’une des parties “ n’aurait pas rempli ses obligations, étaient considérées “ comme simplement comminatoires ; elles ne s’exécutaient “ point à la rigueur, et la convention n’était pas résolue par “ le seul accomplissement de la condition dans le temps fixé “ par la convention, quand même il eut été expressément “ stipulé que la résolution serait encourue de plein droit, “ par la seule échéance du terme, sans qu’il fût besoin d’acte “ ni de sommation, etc. Quelles que fussent les expressions “ dont les contractants s’étaient servis, leur volonté la mieux “ marquée était impuissante pour opérer la résolution de “ plein droit. Les tribunaux s’obstinaient à juger que ces

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(1) 11 Toullier, pp 178, 179, Nos. 135, 136, 137, Voie de Fait :—1 Argou, p 302 :—Instructions sur les Conventions, p. 75 :—Rep. de Jurisp., vbo. Voie de Fait.

" clauses n'avaient d'effet qu'à l'arbitrage des juges, selon la qualité du fait et des circonstances." (1)

The condition for the prepayment of the pew rent, under pain of the lease becoming absolutely void, would, it seems, have been held comminatory under the Jurisprudence above described.

This Jurisprudence has been condemned as arbitrary and unjust by our most eminent jurists ; (2) and I have no hesitation in saying that I think it was so.

It appears to me that when parties have entered into a contract, not opposed to law or good morals, and which can be carried into execution without injustice, that a competent tribunal refusing to give effect to such a contract, is guilty of a denial of justice ; applying this principle to the present case, I am of opinion that we would not be justified in refusing to give effect to the clause which makes the prepayment of the pew rent, the condition of the continuance of the lease. That clause not only has no immoral or illegal tendency, but on the contrary, tends to promote the public good.

The prepayment of the pew rents enables those who have to meet obligations contracted for the building or repairs of the church, to know that at a given time they may count upon a certain fund ; and it obviates the delay, expenses, litigation, losses and other *désagréments*, incident to the collection of arrears. It is established that the system of causing pew rents to be paid in advance has been universally followed in the church in question since it was built in 1849, and also in the Church in the St. Roch suburb of this

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(1) 6 Toullier, p 581, No. 550 :—Rep. vbo. Clause Comminatoire :—Pothier, Vente No. 459 :—Brodeau sur Louel, lettre P. No. 50.

(2) The language of Toullier on this subject is very forcible—same number 550.—" Nous avons observé *supra* que cette jurisprudence était marquée au coin " de l'erreur la plus manifeste, destructive des conditions, sans lesquelles les contrats n'auraient point eu lieu ; qu'elle était attentatoire à la foi publique, et " qu'elle attaquait ses conventions jusque dans leurs bases les plus sacrées."

city for a considerable number of years, and that it has been productive of great advantages ; as to the Plaintiff, it is not contended that he has suffered any actual loss or damage by the resale of his pew. That proceeding will merely cause him to sit in another part of the church, which is not a grievance that calls for the interference of this tribunal. For these reasons it appears to me, that, as the agreement under review is not only in all respects perfectly unobjectionable, but is moreover a very judicious arrangement, we ought to let it have its full effect, according to the clearly expressed intentions of the parties ; and, consequently, to hold that the resale of the Plaintiff's pew by the Defendants, was legal and perfectly effectual.

A case decided by me in the Circuit Court has been cited by the Plaintiff. In that case the Plaintiff sued for arrears of pew rent, and at the same time prayed that the lease might be declared null, in consequence of the non payment of the pew rent at the time agreed upon. The Defendant having offered to pay the arrears, I allowed him to do so, and refused to cause him to be ejected from the pew. I do not know whether the conditions of the lease in that case were exactly the same as those in the lease now before us, but even if they were, the fact of arrears having been allowed to accumulate would seem to shew that both parties had treated the clause for the resale of the pew as comminatory, and if so, the Court might well do so likewise.

In that case also, there was no proof, such as we have in the present case, as to the importance or utility of the stipulations for prepayment, nor have I any recollection of the case having been argued as involving any important general principle. It certainly did not occur to me then that I ought to deviate from the Jurisprudence to which I have already alluded ; and it will at once be seen, that if there is to be any change in the Jurisprudence, as to the effect of resolutive

clauses, it is more fitting that such change should be made by the Court having the highest original civil jurisdiction, and from the judgments of which there is an appeal, rather than by a Judge deciding non appealable cases in a summary Court.

I will merely add that as to the Defendant's costs, I do not think there ought to be a judgment against the Plaintiff; according to the old Jurisprudence, the Plaintiff would, I think, have been entitled to a judgment in his favour. It is true that that Jurisprudence which is not founded on any positive law, is in our opinion so unreasonable and unjust, that we cannot regard it as binding upon us; but still the Plaintiff can hardly be blamed if he relied upon it. Moreover, this case involves an important question, in the settlement of which the Defendants are deeply interested, I therefore would not think we subjected them to any injustice, were we to dismiss the action without awarding costs to either party.

Jugement pour les Défendeurs, le 19 Avril, 1854, comme suit :

“ La cour, etc. Considérant que par le bail consenti au Demandeur par la Fabrique de Québec, il est stipulé que le prix ou loyer du banc mentionné au dit bail, pour chaque année, sera payé en deux payements égaux de la somme de une livre, dix chelins, sept deniers et demi, courant, chaque, dont le premier payement a été fait à l'instant, et que les autres se feront, respectivement, le ou avant le quinze Décembre, ou le quinze Juin, chaque année, et ainsi de six mois en six mois pendant la durée du dit bail ; qu'à défaut du paiement du dit loyer aux dits termes et époques, dès lors et aussitôt après l'expiration de chacun des dits termes le dit bail sera et demeurera nul et résolu de plein droit, et la dite Fabrique rentrera en possession du dit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans .

“ être tenue de donner aucun avis ou assignation au dit pre-  
 “ neur : Et vu que par la preuve il est constaté que le De-  
 “ mandeur n'a point payé le loyer du dit banc aux termes  
 “ stipulés par le dit bail, et qu'en conséquence de tel défaut  
 “ de payement, la dite Fabrique a pris possession du dit  
 “ banc, et l'a vendu et adjugé le deuxième jour de Juin, mil  
 “ huit cent cinquante-trois, au nommé Anaclet Vézina, étant  
 “ le plus haut et dernier enchérisseur, déboute le Deman-  
 “ deur de son action, avec depens : auquel jugement son  
 “ honneur, M. le Juge Meredith, a déclaré être d'une opinion  
 “ contraire, quant aux frais seulement.”

De ce jugement le Demandeur interjetta appel.

TASCHEREAU, J. T. pour l'Appelant.

La question qui s'élève en cette cause, et la seule suivant moi, est de savoir si les Intimés, en vertu de la clause citée, avaient le droit de déposséder l'Appelant du banc qui lui était loué, et d'en prendre possession *de pleno*, et sans aucune autorité de justice. Dans notre système, cette clause est toujours réputée comminatoire, et les Intimés n'avaient pas le droit, de leur propre chef, de se mettre en possession du banc, et d'en expulser l'Appelant, ils devaient faire prononcer la déchéance par les tribunaux, qui, en pareil cas, prononce tel déchéance, tout en accordant un délai pour l'exécution de la convention. (1)

Si la proposition que je viens d'énoncer, savoir, que les Défendeurs n'avaient pas le droit, de leur propre autorité, de se mettre en possession du banc de l'Appelant, et de l'en expulser, est vraie, ils se sont par leur conduite rendus coupables d'une voie de fait, et la cour inférieure eut dû condamner les Intimés à des dommages exemplaires.

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(1) Pothier, Obligations, No. 672 :—Pothier, Vente Nos. 458, 459, 472, 474, 475 :—Nou. Den., vbo. Clause Comminatoire :—2 Argou, liv. 3, sec. 12, art. 3 et 12 :—Rep. de Guyot, vbo. Clause Resolutoire :—Leyseau, des Seigneuries, ch. 2, Nos. 73 et 74 :—1 Maréchal p. 269.

**BAILLARGÉ, pour les Intimés.**

Les prétentions de l'Appelant peuvent se résumer à deux propositions :

1o. Pour que l'Appelant puisse être légalement déchu du banc, il eut fallu un jugement préalable, déclarant cette déchéance, sur une action, fondée sur le défaut de paiement, portée devant le tribunal compétent.

2o. En rendant un tel jugement, la cour eut dû accorder un délai ultérieur, sous lequel le Défendeur poursuivi, aurait pu, en payant, empêcher la résiliation du bail, et retenir la possession du banc.

Pour repousser et détruire la doctrine contenue dans ces deux propositions, si injuste, si arbitraire et si contraire aux vrais principes, il suffit de référer aux nombreuses citations faites lors de l'audition de la cause en Cour Inférieure ; ces autorités, dont les principales sont ici invoquées, sont tirées des auteurs les plus respectables, et font ressortir dans les termes les plus énergiques, toute l'absurdité, et tous les inconvénients qu'il y aurait à admettre que les juges peuvent sortir de leurs attributions en faisant des conventions pour les parties, au lieu de leur fournir les moyens d'obtenir l'exécution de celles qu'elles ont jugées à propos de faire elles mêmes, et de permettre aux Cours de Justice de délier les contractants des obligations qu'ils ont volontairement contractées, au lieu de les forcer à les exécuter de bonne foi.

Les autorités établissent de la manière la plus claire, que les conditions légalement formées tiennent lieu de loi à ceux qui les ont faites ; qu'elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise ; qu'elles doivent être exécutées de bonne foi ; que les tribunaux doivent leur donner suite et effet, et n'ont

aucun droit d'en dispenser les parties arbitrairement ou de les changer ou modifier à leur gré. (1)

Les autorités citées par l'Appelant, consistent dans des décisions données en France par des tribunaux, qui, à l'époque où elles ont été rendues, s'arrogeaient le pouvoir de mettre de côté la loi que s'était faite les parties, par suite de la confusion existant alors entre le pouvoir judiciaire et le pouvoir législatif, confusion qui a disparu depuis longtemps, et qu'il serait bien imprudent de faire revivre.

Si la doctrine invoquée par les Intimés est correcte, et si elle doit être suivie dans les conventions en général, et dans les cas ordinaires, à plus forte raison doit-elle l'être dans le cas particulier dont il est question en cette cause, où tout devrait engager la cour à s'abstenir d'exercer la discréption qu'on lui suppose, dans le cas où, de fait, elle la posséderait légalement.

Sir L. H. LA FONTAINE, Juge-en-Chef : Le 13 Juin, 1852, bail ou concession, (sur adjudication en la forme ordinaire) par les Marguilliers à l'Appelant, du banc No. 11, dans la Nef de l'Eglise Sucçursale du Faubourg St. Jean (susdite paroisse) pour trois ans, à commencer du 1er Juillet, 1852, dont acte authentique devant notaires ; le dit bail fait à raison de £3 1 3 de loyer par année, stipulé payable, ainsi que porte l'acte "au procureur de la dite Fabriqué, en sa "demeure, en deux paiements égaux de £1 10 7½ courant, "chaque, desquels le premier fut fait à l'instant, et les autres "devant se faire le ou avant le 15 de Décembre alors pro- "chain, et ainsi de six mois en six mois pendant la durée "du dit bail."

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(1) 36 Merlin, Répertoire, vbo. Voie de fait, pp. 256 et 257 :—6 Toullier, No. 245, pp. 253 et 254 :—1 Argou, pp. 302 et 503 :—Instructions sur les Conventions, p. 75 :—6 Toullier, Nos. 941, 942, 938, 939, 940 :—4 Nou. Denisart, vbo. Clauses Comminatoires, pp. 566, 567 :—4 Rep. Guyot, vbo. Comminatoire, pp. 78, 79 :—1 Dieulin, Guide des Curés, pp. 104 et 106 :—3 Ordonnance, 30 juin, 1768, p. 261 :—4 Encyclopédie de Droit, vbo. Comminatoire, p. 587 :—6 Merlin, Questions de droit, vbo. Emphytose, p. 268 : 3 Prevost de la Jannès, p. 151 :—6 Toullier, Nos. 288, 289.

Il fut en même temps stipulé "qu'à défaut du paiement "du dit loyer, aux divers termes et époques ci-dessus fixés, "dès lors et aussitôt après l'expiration d'*aucun* des dits "termes, le dit bail serait et demeurerait *nul et résolu de plein "droit*, et la dite Fabrique entrerait en la possession du dit "banc, et *pourrait procéder à une nouvelle adjudication d'ice- "lui*, sans être tenue de donner aucun avis ou notification au "dit preneur."

Le semestre dont le paiement devait être fait le ou avant le 15 Juin, 1853, n'ayant pas été payé, la Fabrique fit procéder publiquement, en la manière ordinaire de concéder les bancs dans cette église, à une nouvelle adjudication du dit banc No. 11, le 26 Juin, 1853, ce nouveau bail, fait au nommé Anaclet Vézina, devant commencer au premier Juillet suivant.

Le 28 Juin, 1853, l'Appelant offrit au procureur de la Fabrique la somme qu'il aurait dû payer dès le 15, lesquelles offres furent refusées à raison de la nouvelle concession du banc.

Bien qu'informé de cette adjudication du banc à Vézina, l'Appelant, accompagné de deux individus retenus à cet effet, se rendit, le Dimanche suivant, 3 Juillet, à l'église, longtemps avant le commencement de l'office, se plaça dans le banc avec ces deux personnes, et en refusa l'entrée au nouveau locataire.

Le 4 Juillet, notification par écrit de la part du Marguillier en charge à l'Appelant, de se désister de l'usage du banc en faveur du nouveau locataire ; et le samedi suivant, neuf Juillet, communication est faite, de la part du Marguillier en charge à l'Appelant, de l'injonction donnée aux connétables chargés de maintenir l'ordre dans l'église, de l'expulser dans le cas où le lendemain, Dimanche, il insisterait de nouveau à se mettre dans le banc. Nonobstant toutes ces précautions,

et malgré la prière à lui faite avant la messe, le Dimanche, par l'un des connétables, de ne pas insister à occuper le banc, l'Appelant n'en persista pas moins dans sa détermination, et ce jour là, Dimanche 10 Juillet, accompagné de deux personnes étrangères à sa famille, il alla se placer dans le banc. Il l'abandonna quelques instants après, mais ce ne fut que sur la requisition des connétables.

De ces faits a surgi la présente action, intentée le 10 Août, 1853, et déboutée le 19 Avril, 1854, par la cour supérieure à Québec.

Les conclusions de la demande sont "que les Défendeurs " (la Fabrique) soient condamnés à laisser jouir le Demandeur paisiblement et tranquillement du dit banc No. 11, à " lui en remettre l'usage et occupation, à lui permettre de " l'occuper sans délai, et que, faute par les Défendeurs de " ce faire, ils soient condamnés à payer au Demandeur la " somme de £500 courant, avec intérêt et dépens."

La Fabrique a opposé à cette demande la clause ci-dessus rapportée du bail du 13 Juin, 1852, relative au défaut de paiement du loyer, et a invoqué les faits tels qu'ils viennent d'être exposés.

D'après la manière dont cette cause a été instruite et plaidée, il n'y a à examiner que la question de savoir si, dans les circonstances du procès, cette clause invoquée par la Fabrique comme étant absolue, et devant produire un effet immédiat, ne doit pas, néanmoins, être considérée que comme *communatoire*, ainsi que le prétend l'Appelant.

Il a été établi que les deux adjudications du banc en question, tant à l'Appelant en 1852, qu'au nommé Vézina en 1853, ont été faites publiquement, après avis régulièrement donné au Prône, deux ou trois semaines auparavant, et ce conformément à l'usage ou règle établi pour procéder à la

concession des bancs dans cette église, avec l'approbation, en toute apparence, de la presque totalité des parties intéressées, (1) puisque tous les baux contiennent la même clause ; que tous les ans, au temps ordinaire, on a procédé à une nouvelle concession de plusieurs bancs, à défaut de paiement, par le ci-devant concessionnaire, au temps stipulé dans le bail ; que plusieurs autres bancs ont été de même adjugés de nouveau le 26 Juin, 1853, en même temps que celui de l'Appelant, sans que jamais aucune personne s'en soit plaint, si ce n'est l'Appelant lui même. Il est également prouvé que la prétendue voie de fait dont se plaint l'Appelant, si toutefois voie de fait il y a, n'a été accompagnée d'aucune violence quelconque, ce fait est constaté par deux témoins qui étaient dans le banc avec l'Appelant le 10 Juillet, 1853. L'on peut encore remarquer que l'Appelant lui même savait que le banc avait été concédé de nouveau à Vézina, puisqu'il dit dans sa déclaration que les Défendeurs ont même loué et baillé à "une autre personne le dit banc." Cet allégué du Demandeur, soit dit en passant, tout en venant au secours de son adversaire en l'exemptant d'en prouver le fait, aurait pu peut-être fournir à ce dernier l'occasion de prétendre que l'action n'était pas régulièrement intentée, puisque le nouveau concessionnaire n'était pas mis en cause avec la Fabrique. (2)

Quant à la question principale, celle de la nature de la clause dont il s'agit, je ne crois pas que, dans l'espèce, cette clause puisse être regardée comme *communatoire*. Elle me semble appartenir à ces conventions auxquelles s'applique le passage du Repert. de Jurisprudence à l'article "Comminatoire" : "Si lors de la convention il est dit que 'la chose s'exécutera dans tel délai, ou qu'autrement le traité demeurerá nul de fait et de droit, sans autre sommation ni interpellation, comme il est évident dans ce cas que

(1) 3 Nouv. Denisart, vbo. Banc dans l'Eglise, § 3, p. 164.

(2) 2 Edits et Ord., p. 103, Ordonnance de l'Intend. Hocquart du 29 Décembre, 1733 :—Stuart's Reports, p. 132, Borne vs. Wilson, et al.

“ l'intention des parties a été que cette clause s'exécutât à la rigueur, la simple expiration du délai lui donne tout l'effet qu'elle doit avoir; sans entrer dans aucun examen si la chose peut se différer encore ou non: autrement les conventions les mieux conçues deviendraient illusoires.” (1)

Les concessions des bancs sont faites à une époque fixe. Il est de l'intérêt de la Fabrique et des parties concernées, y compris l'Appelant, qu'il en soit ainsi, puisque cela tendant à assurer à une époque également fixe la recette des revenus qui en découlent, la Fabrique est par là mise en état de remplir les engagements de son administration. Elle serait privée de cet avantage, si la clause dont il s'agit n'était que *communatoire*, et qu'il fallût, dans chaque cas particulier, une assignation pour constituer le locataire d'un banc en demeure.

Une autre remarque à faire, c'est que, bien qu'avant d'intenter son action, l'Appelant ait offert de payer le loyer échu, il n'a pas néanmoins renouvelé ses offres par l'action même. La Fabrique, il est vrai, semble ne pas avoir insisté sur ce fait, cependant il paraît assez juste de dire que, si l'une des parties veut forcer l'autre à remplir ses engagements, elle devrait au moins se montrer prête, de son côté, et offrir, par conséquent, à remplir les siens.

Le jugement de la Cour Inférieure est confirmé comme suit:

La cour après avoir entendu les parties par leurs avocats, examiné la procédure en Cour Inférieure, les griefs d'appel et les réponses à iceux, et sur le tout murement délibéré : confirme le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure à Québec, le dix-neuf Avril, 1854, et condamne l'Appelant aux dépens.

TASCHEREAU, J. T. pour l'Appelant.

BAILLARGÉ, L. G. pour les Intimés.

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(1) 1 Revue de Juris., p. 33, Beaudry vs. Bareille.

QUEEN'S BENCH. } DISTRICT OF MONTREAL.  
 APPEAL SIDE.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, PANET  
 AYLWIN and C. MONDELET, Justices.

{ SYMES, (*Defendant in Court below,*) Appellant,  
 and  
 { LAMPSON, (*Plaintiff in Court below,*) Respondent.  
 and  
*Vice versa.*

In an action to account, on an agreement by a party to advance monies for the building of a ship, to be reimbursed out of the proceeds of the sale of the said ship (which such party is authorized to send to his friends in Liverpool or London, and for that purpose to appoint and substitute attorneys or agents), together with all expenses and charges attending such sale, and also a commission of five per cent :

Held :—1o. That such account need not be in the form of a *compte de tutelle*, and may be made in the usual commercial form.

2o. That the party making advances, over and above his commission of 5 per cent, is entitled to charge the commission of his attorneys or agents in England who effected the sale of the ship, at 4 per cent, which is proved to be the usual charge, and which is payable on the whole price of the sale made at credit, although part was paid within a few days after the transaction ; and also a Bank Commission of  $\frac{1}{2}$  per cent charged by the sub-agent, and which is usual in England on similar transactions.

3o. That the said party is not liable by reason of the bankruptcy of his substitutes for monies due by them ; and that the principal is to bear such loss, inasmuch as, under the circumstances, the substitutes were his own attorneys and agents ; there being no evidence that the agent was not justifiable in appointing the said sub-agents.

Dans une demande en reddition de compte, sur convention par une partie d'avancer les fonds nécessaires pour la construction d'un navire, à être remboursés sur le prix de ce navire (que cette partie était autorisée à envoyer à ses amis à Liverpool ou à Londres, et de nommer à cet effet des sous-agents et substituts), avec tous les frais et charges pour parvenir à la vente, et en sus une commission de cinq pour cent sur les avances :

Jugé :—1o. Qu'il n'est pas nécessaire que tel compte soit revêtu de toutes les formalités d'un compte de tutelle, et peut être fait dans la forme ordinaire.

2o. Que la partie a droit, en sus de sa suidie commission, de charger celle des sous-agents qui ont effectué la vente en Angleterre, portée à 4 pour cent, et prouvée être la commission ordinaire, qui est exigible sur tout le prix de la vente qui était faite à crédit, quoique partie en ait été reçue quelques jours seulement après telle vente ; aussi une Commission de Banque de  $\frac{1}{2}$  par cent, prouvée être usitée en Angleterre dans ces sortes de transactions.

3o. Que cet agent n'est pas responsable par suite de la faillite du sous-agent ou son substitut, des deniers que ce dernier pouvait avoir entre ses mains appartenant au mandant ; que ce dernier en doit supporter la perte, le sous-agent étant son préposé d'après l'autorisation sus-mentionnée ; la preuve n'établissant aucunement que l'agent n'était pas justifiable de nommer ce substitut.

Judgment rendered the 30th September, 1884.

Sir L. H. LAFONTAINE, Bt. Chief-Justice : There are two appeals in the present case, Symes having appealed from a

judgment of the 14th January, 1851, condemning him to render a certain account to Lampson, and also from another judgment of the 24th May, 1852, by which, upon contestation of the said account, he is ordered to pay to the Plaintiff the sum of £285 8 0 $\frac{1}{2}$  currency ; and Lampson having appealed from the latter judgment, in so far as it rejected his claim to another sum of £245 14 11 currency.

This was an action *en reddition de compte*, based entirely, as set forth in the Plaintiff's Declaration, upon a certain *acte sous seing privé* made by the parties, at Quebec, on the 25th June, 1841, the substance of which is as follows :

" Upon the Plaintiff's application, divers sums of money,  
 " to the amount of £6,500 currency, having been *heretofore*  
 " advanced to him by the Defendant, (upon and for *the considerations hereinafter* mentioned,) in order to enable him  
 " to proceed with the building of a certain Ship (called the  
 " *Palestine*,) which was then (25th June, 1841,) ready for  
 " sea. For and in consideration of the said advances so  
 " made by Symes " in pursuance of the said agreement",  
 " the Ship is sold by Lampson to Symes ; upon trust, how-  
 " ever, that Symes shall dispose of the same, either by public  
 " auction or private contract, for the best price that may *in*  
 " *his judgment*, be reasonably had, &c. &c.,—and out of the  
 " monies arising from such sale, or otherwise coming into  
 " his hands on account of the said Lampson, to retain so  
 " much thereof as shall be necessary to pay and satisfy the  
 " said sum of £6,500, and also all such other sum or sums  
 " of money as he, Symes, shall or may hereafter pay, lay  
 " out, advance, or become liable to pay, to or for the use of  
 " the said Lampson, and all expences and charges attending  
 " the said sale ; together with lawful interest for the same,  
 " to be computed from the respective days of paying or ad-  
 " vancing the same as aforesaid, and also the *commission*  
 " *agreed upon*, upon the amount of such sale and upon the

" amount of such freight as shall be collected by Symes, or  
 " his agents ; and upon the further trust, to pay or deliver the  
 " residue or overplus thereof (if any) unto Lampson, his  
 " executors, administrators or assigns, or to whom he shall  
 " direct or appoint; lawful for Symes, or his attorney, to  
 " insure, &c., and to deduct the premium of such insurance  
 " from the sums of money coming into his hands from the  
 " sale, &c., &c.,—the said Lampson appointing Symes or  
 " his assigns or attorneys, the true and lawful attorneys  
 " irrevocable of him the said Lampson, &c., &c.,—and  
 " Symes is also authorized to appoint and substitute one or  
 " more attorney or attorneys, agent or agents, under him the  
 " said Symes for the purposes aforesaid, with the like or  
 " more limited powers, &c., &c.,—Lampson hereby ratify-  
 " ing, allowing and confirming all and whatsoever Symes,  
 " his attorney or attorneys, substitute or substitutes shall  
 " lawfully do, &c., &c.,—lawful for Symes to cause "The  
 " Palestine" to proceed to some port in the United Kingdom  
 " (or to such other ports or places as shall be deemed most  
 " advisable) for the purpose of effecting a sale of the said  
 " Ship, &c., &c.,—moreover, Symes is authorized *to let the*  
*"said Ship to freight* for such a voyage or voyages as he  
 " shall think fit—*the freight to be received by him Symes*, and  
 " applied in the same manner and to the same purposes as  
 " hereinbefore mentioned with respect to the proceeds arising  
 " from the sale of the said Ship, &c., &c.,—the said Lamp-  
 " son also transferring to Symes all and singular such freight  
 " as the said Ship or Vessel may make on her intended voyage  
 " from Quebec to Liverpool, or any other subsequent voyage  
 " that the said Ship may be employed upon."

The Declaration, after having in part recited the act of  
 25th June 1841, states that the Defendant had collected, as  
 and for freight of the said vessel on a voyage to Great Bri-  
 tain, the sum of £2000, and in the summer 1843, or there  
 about, had sold and disposed of the said Ship for £8000 ;

but that he had not yet rendered "a just and true account in the form required by law, &c. &c."

The action was instituted as late as April 1848, about six years after the transactions from which it originated.

To that action, besides the general issue, Symes pleaded by peremptory exception, "that on the 15th July 1842, he had rendered to the Plaintiff a true and faithful account of the sale of "The Palestine," showing a balance of £278 17s 4d currency, which balance had been paid by him to Forsyth and Bell at Quebec, as he had been requested to do by the Plaintiff, on the 16th day of June 1841, the said account accepted by Lampson :—that the freight was not paid to the Defendant, but that the same, by order of the Plaintiff, was paid to the said Forsyth and Bell, with the exception of £545 12 7 sterling, received by the Defendant, and by him applied to the payment of a like amount expended for the disbursements of "The Palestine," as set forth in the said account."

In his reply to the exception the Plaintiff admitted "that, about the 7th July 1842, the Defendant had sent him an account, whereby a sum of £393 1 5 would appear to be due by the Plaintiff, in which account, he says, there are various over-charges, omissions and errors, whereof the Plaintiff notified the Defendant immediately after the delivery thereof, and which said account was unaccompanied by any vouchers whatever; that the Defendant did receive the sum of £700 sterling, of the freight earned by the Ship, but no account was rendered of the same ; that he never authorized the Defendant to pay any sum of money to Forsyth and Bell."

The parties proceeded to *enquête*, and on the 14th January, 1851, was pronounced the Judgment appealed from by Symes, by which he is ordered to render an account of the sale of

"The Palestine" and "for such part of the freight which the Defendant *may have received.*"

On the 18th November, 1851, the Defendant, Symes, filed an account, under oath, in obedience to the foregoing Judgment, which account was afterwards contested by the Plaintiff; and by a final Judgment of the 24th May, 1853, the Defendant is condemned to pay to Lampson the sum of £285 8 0*½*, with interest from 10th April, 1848, date of service of process, and costs of suit.

Previous to making any comment on the issue joined between the parties, upon the account rendered by the Defendant, it may be well and even necessary to refer to certain documents produced in the cause.

The first, in order of dates, is a "memorandum of agreement," dated Quebec, 14th November, 1840, entered into between the Plaintiff and the Defendant. This is the agreement, or rather a part of the agreement, alluded to in the *acte sous seing privé* of the 25th June, 1841. Symes agrees to advance certain sums of money to Lampson, to assist him in the building of the ship in question: "For and in consideration "of which advances the said Geo. Burns Symes, is to receive "a commission on the sale of the vessel of five per cent, with "legal interest on the said advances until reimbursed and "paid up, which, it is understood, shall not be later than "1st of July next, and should the vessel not be disposed of "by sale here, it is understood that she shall be sent for sale "through Geo. Burns Symes, to his friends in London or "Liverpool, as may be agreed on, who shall be authorized "to sell the vessel and do the general business connected "with her upon the usual terms and conditions, independent "of the commission now understood and agreed to be paid "Geo. Burns Symes, on the sale of the ship, whether it is "effected here or in England, through the agency of his friends, "under his direction and instructions."

Forsyth and Bell were parties to that agreement, and undertook to guarantee the due fulfilment, by Lampson, of his part of the above engagement.

The second document, which shall hereafter be called "the Receipt," is dated Quebec, 16th June, 1841, and signed by Lampson, and Forsyth and Bell, *but not by Symes*, it is as follows :

" Received from Forsyth and Bell, their note for £750 at " 90 days, and it is further agreed that if required, a further " advance of £850 is to be made by them in consideration of " their receiving the freight and cargo of "The Palestine," " less any sum paid by their correspondent in Liverpool to " the correspondents of G. B. Symes, in that City, as part of " freight. The cargo freight free, with this reservation, to " be put on board by W. Lampson, and consigned by Forsyth " and Bell to James Robertson, Esquire, for sale on Mr. " Lampson's account.

" The above £1600 to be subject to a commission of five per cent."

" Dear sir, be so good as pay Forsyth and Bell £1600 in " your notes at 90 days, as a further advance on "The Palestine," to be secured in a similar manner as the sum already " advanced, and subject to a like commission," and in a *postscriptum* ;

" Any balance on the vessel, when sold, after paying your " advances, to be held subject to the order of Forsyth and " Bell."

With regard to the issue joined between the parties, there is no need to enter into the consideration of the question whether a true account had been actually rendered by the Defendant to the Plaintiff or not, before the institution of this suit. There is, in my opinion, sufficient evidence to prove

that such an account was rendered in 1842, according to the custom of merchants, and in a form justified by the nature of the transaction. The depositions of Mitchell, Young and Forsyth leave no doubt on the subject ; but as the Defendant, without making any *reserves and protestations*, has rendered on oath, and filed an account in obedience to the Judgment of the 14th January, 1851, although the said account may be considered as being but a duplicate of the one which he formerly rendered, I am of opinion that the Defendant has thereby *acquiescé* in that Judgment, and is, therefore, by his own act, precluded from disturbing it.

We must then come to the merits of the case, upon the contestation of the Defendant's account, as being the only matter to be now inquired into, five items are contested :

1o. The commission of 4 per cent charged in England by Symes' agents upon the sale of "The Palestine," amounting, as stated in the Defendant's account, to £210 5, and not £226 5 8, as mentioned in the *débats de compte*, and in the Judgment of the Court below ; this commission is said to be in the nature of a guarantee or *del credere* commission, and it is clearly proved to be the *usual* commission on similar transactions. It is, however, objected to by the Plaintiff, on the ground that the commission of 5 per cent, which, according to agreement, the Defendant was to receive for himself, was intended to include, and did include, all charges &c, and therefore, such a guarantee commission. But there is no proof in support of that statement of the Plaintiff ; on the contrary, the evidence goes clearly to establish that the commission of 5 per cent, allowed to the Defendant, is a fair and reasonable commission, which is usually charged at Quebec by merchants, upon transactions similar to that entered into between the Plaintiff and Deten-

dant, exclusive of the usual guarantee commission charged by the agent in England. Besides, the charge in question is justified by the express understanding between the parties. The *acte sous seing privé* of the 25th June 1841 is not, as the Plaintiff seems to pretend, the only agreement, or rather the only document to look to as evidencing what was the agreement subsisting at that time between the parties. When that *acte* was made, there was a previous agreement existing between them, as appears by the memorandum of the 14th November 1840, and "the letter" of the 16th June 1841; such agreement is expressly referred to in the said *acte* of 25th June 1841, which was entered into only the better to give effect to it. We observe that, in the *acte* of the 25th June 1841, mention is made of a commission allowed to the Defendant, but without stating what is the amount of such commission. The words are "the commission agreed," and nothing more; yet, in his pleadings, the Plaintiff admits that it is a commission of five per cent. Then it may be asked: when and where was such a commission settled? It was so settled as early as the 14th November 1840, by the "memorandum" of agreement of that date; and this is the same commission which is afterwards referred to in the Plaintiff's letter of the 16th June 1841. The rights and obligations of the parties are, therefore, to be regulated, not only by the *acte* of 25th June 1841, but also by the "memorandum" and "the letter" above alluded to. By the agreement contained in the "memorandum," "The Palestine," when sent for sale to the Defendant's friends in London or Liverpool, was there to be sold by them "upon the usual terms and conditions, independent of the commission now understood and agreed to be paid Geo. Burns Symes on the sale of the Ship," that is to say, independent of the said commission of five per cent. It is in evidence that the "usual terms and conditions" of such a sale made in England, include a commission of 4 per cent charged by the agent. In fact, the Court below admitted

that it was a just and reasonable charge, but allowed it only for that part of the price of the Ship for *which* it is said, *credit was given*, and not for that part which the Court assumed had been paid in ready money on the day of the sale, and as a condition of the same. My opinion is that, in the circumstances of the case, it should have been allowed upon the whole of the price. First, it appears that "The Palestine" was sold for £5256 5 0 sterling, at 6 months credit, and not for £5192 13 8, as assumed by the Court below; the said price payable by three instalments, the first of which, it is true, was paid by the purchaser immediately after the sale; but he seems to have paid it so, only to suit his own convenience or interest, upon being allowed the discount, as usual in such cases, amounting in the present instance to £63 11 4, the first instalment being £2000, and the other two £1628 2 6 each. In the second place, it appears to me that the Defendant's agents at Liverpool, Anderson, Garrow & Co. to whom "The Palestine" was consigned for sale, and who sold her under the authority of the Plaintiff, as conveyed to them through the Defendant in pursuance of the then subsisting agreement, were entitled to the usual commission of 4 per cent, whether the price of sale was paid cash or not, and that the said commission was, in either case, to be borne by the Plaintiff. Being thus entitled to such a commission, Anderson, Garrow & Co. had a right to charge it, as they have done, in their account against Symes. In the circumstances of the case, it formed part of the expenses incurred by the latter in fulfilling his agreement with the Plaintiff; and, if, in the case of the whole price of sale being paid cash, the Defendant could not claim to be reimbursed such expenses by the Plaintiff, the consequence would be to reduce his own commission of five per cent to one per cent. Or, if, upon such a sale made for ready money, the Liverpool agent is not to have any commission at all, it would follow, as justly observed by the

Counsel of the Defendant, that "the entire service of Anderson, Garrow & Co., their agency, correspondence, selling the Vessel, making out accounts, &c , &c., would actually have been rendered by them without any remuneration whatever." Nor does the fact, as alleged by the Plaintiff, of the Defendant being in England at the time of the sale, make any difference in the case ; by his agreement with the Plaintiff, he had not undertaken, either to go to England to sell "The Palestine" himself, nor, if happening to be there at any time for his private affairs, to take upon himself the sale of the Ship without having recourse to any agent on the spot. There is, therefore, in my view of the case, nothing to warrant the pretensions of the Plaintiff in respect of that commission of 4 per cent, which should have been allowed upon the whole of the price of sale.

The 2d item of the Defendant's account, objected to by the Plaintiff, is the charge of  $\frac{1}{2}$  per cent, Bank Commission, (in England) amounting to £13 2 9 sterling, which, in fact, is included (with two other small items not contested) in the above sum of £226 5 8, stated erroneously by the Plaintiff to be the amount of the agent's commission of 4 per cent. That charge of  $\frac{1}{2}$  per cent is proved to be a reasonable and usual charge for Bank Commission on similar transactions, and as such, it was maintained by the Court below. The preceding remarks upon the 1st item mostly applying to this point, I am of opinion that the charge was rightly allowed.

The 3rd item of the contestation is as to the amount of premium of exchange (being 8 per cent only) which was allowed to the Plaintiff in the Defendant's account. It is objected to on the ground alleged by the Plaintiff that the Defendant actually received (which is not proved) the sum of 13 per cent for the sums of money he drew for on England, and also upon the ground that, at the time the Defendant might or could have drawn against the proceeds of "The

"Palestine" in England, the current rate of exchange was 12 per cent premium. The Court below allowed 12 per cent upon the sum of £1936 8 8 sterling, because, as stated in the judgment, a similar sum having been paid in ready money, in Liverpool, on the 26th day of February, the day of the sale, it could, with reasonable diligence, have been drawn for at Quebec in the month of March following, by bills payable at sight, the *premium* of exchange being proved to be at that time 12 per cent; but the Court overruled the Plaintiff's objection as to the rate of exchange upon the remainder of the price of sale, allowing, therefore, upon the latter only 8 per cent. I do not think the evidence justifies the conclusion arrived at by the Court below in that respect. Nothing shows that the Defendant should have drawn, or was in a position to draw, so early as in March 1842, and that, not having done so, there was a want of due diligence on his part, and that, therefore, he had failed in his duty towards the Plaintiff. The account sales it is proved were not received in Quebec until May 1842 and it is further proved that at that period, and for several months afterwards, 8 per cent was the current rate of exchange, at Quebec, upon bills drawn by merchants. For these considerations, I am of opinion that the Plaintiff ought not to have been allowed a higher premium upon any part of the monies to be drawn for on his account.

The 4th objection to the Defendant's account relates to a sum of £152 12 5.

Under the agreement made by Lampson and Forsyth and Bell, on the 16th June, 1841, but to which Symes was not a party *at the time of its making* (see "the Receipt" above referred to), it appears that a sum of £700 was paid into the hands of Anderson, Garrow & Co., by the Liverpool agent of Forsyth and Bell. Both parties admit that that sum was paid to cover the disbursements of the vessel; that it was so paid.

under the "agreement" contained in "the Receipt," with the concurrence or assent of the Defendant. But when was that concurrence or assent obtained, since the Defendant was not a party to that agreement, and that "the Receipt" was made eight or nine days previous to the passing of the *acte* of 25th June, 1841? Evidently it was only obtained after the making of the latter *acte*. Indeed the stipulations in this *acte*, relating to the freight, are totally different from those entered into upon that point; by "the Receipt" agreement, passed a few days before, but to which Symes is not a party, the said freight is to be received by Forsyth and Bell. That very fact is sufficient to show that at the time of the making of the *acte* of the 25th June, 1841, Symes had not yet had any knowledge of "the Receipt" of the 16th of the same month, and that it was only at a subsequent period that he was made cognizant of it, when his permission or consent to act upon the same was demanded and obtained by the Plaintiff, as stated in the Defendant's answer to the 4th objection made to his account by the Plaintiff. This is the only way, it seems, to explain or reconcile the conflicting stipulations relative to the receiving of the freight, since it is now admitted that "the Receipt" of the 16th June, 1841, was subsequently acted upon by all the parties, even by Symes himself, and that the freight was actually received by Forsyth and Bell, it follows that Symes some time after the passing of the *acte* of 25th June, 1841, had waived or given up his right to receiving the said freight, as stipulated by the said *acte*, and that he had ceased from that moment to have any thing to do with it, continuing only to be responsible for such sums of money as, according to the wording of the judgment *en reddition de compte*, he might have received on account of the Ship in question.

Then, according to the statement of Lampson himself, Forsyth and Bell, under this new arrangement, were to receive the freight of "The Palestine," "less any sum necessary to

"be paid to Symes, to cover the disbursements of the vessel, "and which was subsequently fixed at the sum of £700 "sterling, which was paid in the manner provided for by this "agreement," that is to say, the said "Receipt" agreement of the 16th June, 1841. This is the way, therefore, that the said sum of £700, to cover the disbursements of "The Palestine," came into the hands of Anderson, Garrow & Co., of Liverpool, entrusted, as it has been already said, with the sale of the Ship.

Afterwards, it appears that the firm of Anderson, Garrow & Co., became bankrupt, having then expended, in disbursing the ship, only £545 12 7, leaving therefore a balance (after deducting £1 15 0 for bank commission) of the said sum of £152 12 5, which was lost in consequence of their bankruptcy. That balance is allowed to the Plaintiff by the Judgment of the Court below, principally on the ground, "that the Defendant was liable for the acts of the persons employed by him to assist him in performing the obligations so by him undertaken," that is to say, the sale of the ship &c., "and that the Plaintiff could not be held responsible for the acts of the said Anderson, Garrow & Co., with respect to whose appointment and conduct he could not exercise any control ; and that for these reasons, the payment of the said sum of £700 by the Plaintiff, at the request of the Defendant, to Anderson, Garrow & Co., must be deemed, in effect, a payment to him the Defendant."

I think it would have been more consonant with the facts of the case, if the Court below, leaving out of its Judgment the words, "at the request of the Defendant," had stated that the sum of £700 had been so paid, for the use or the interest of the Plaintiff, in pursuance of his agreement with Forsyth and Bell, the said payment not being objected to by the Defendant. The latter had express authority from the Plaintiff to appoint an attorney, a substitute or agent, for effecting

the sale of "The Palestine" at Liverpool, and for receiving the proceeds thereof as well as any other sum of money connected with the same for freight or otherwise. By consigning the Ship to Anderson, Garrow & Co., for that purpose, the Defendant acted within the limits of his powers ; and if that firm thereby became the attorney or agent of the Defendant, it became also, and by that very fact, the attorney or agent of the Plaintiff. In the circumstances of the case, any loss incurred by the subsequent bankruptcy of the firm, ought, in my opinion, to be borne by the Plaintiff, and not by the Defendant who cannot be held responsible for any such loss, unless it be alleged and proved that he was not justifiable in thus appointing as attorney or agent, to act in the matter, the said Anderson, Garrow & Co., as for instance, if he knew or even could, with any reasonable diligence, have ascertained that the firm in question, either was not solvent, or did not enjoy good credit at the time of its appointment, so as to make it unsafe to entrust it with the sale of the Ship. In that case, blame would have attached to the conduct of the Defendant, for want of proper care or prudence and he might then have been held personally responsible. But no such thing is proved, or even alleged by the Plaintiff. Considering, therefore, that the Defendant, who was himself personally interested in selecting a good and solvent substitute, has, in appointing Anderson, Garrow & Co., acted as any other merchant of common prudence or caution would have done in similar circumstances, I am necessarily led to the conclusion that the judgment of the Court below should be reversed with regard to the said sum of £152 12 5, and that the loss of the same should fall upon the Plaintiff.

The 5th and last item contested by the Plaintiff, is the payment, by the Defendant, to Forsyth and Bell, of the sum of £245 14 11, as the balance remaining in his hands from the proceeds of the sale.

The balance of the Defendant's account, as above stated, was at first of a sum of £278 17 4, from which there was subsequently deducted the sum of £33 2 5 for extra-insurance on "The Palestine," leaving a net balance of £245 14s 11d, in favor of Lampson. Forsyth and Bell were then indebted to Symes in a larger amount; and the latter, in an account rendered to them, debited himself and gave them credit for the said balance of £245 14 11, under the authority given by Lampson's letter of the 16th June, 1841, directing "any balance on the Vessel, when sold, after paying your "advances, to be held subject to the order of Forsyth and "Bell." That authority could have been, but never was revoked by the Plaintiff. So, the Court below rightly considering that it had not been taken away by the *acte* of 25th June, 1841, but that it was still subsisting, over-ruled the objection of the Plaintiff. In that part of the judgment, I concur; and as it has been appealed from on the part of Lampson, I am, of course, of opinion that his appeal should be dismissed.

On the other hand, as to Symes' appeal, I cannot, for the reasons above stated, arrive at any other conclusion than that of giving it its full effect. If we take into consideration the fact that the transactions which have given rise to the present litigation, were brought to an end in the year 1842; that upon several occasions afterwards, Lampson applied to Symes for new advances of money, which appear to have been constantly refused, and that it was only in 1848, six years after the close of the transactions, that Lampson made up his mind to institute the present action, there cannot be a doubt that, upon more mature reflection, he will feel that the judgment of this Court gives him very little reason to complain.

"The Court, &c., seeing that under the memorandum in writing dated at Quebec, the fourteenth November, one thousand eight hundred and forty, whereby it was agreed

between the parties that the Ship Palestine, in question in this cause, if not disposed of by sale in Canada, prior to the first day of July then next, should be sent for sale through the Appellant to his friends in London or Liverpool, as might be agreed on, the same was sent by the Appellant to Messrs. Anderson, Garrow & Co. of Liverpool, who had authority from the Respondent, by virtue of the said agreement, to sell the said vessel, and to do the general business connected with her upon the usual terms and conditions, independent of the commission understood, and, by the said memorandum, agreed to be paid to the Appellant by the Respondent in this behalf; and that the said Anderson, Garrow & Co., thus acting as the sub-agents of the Respondent, sold the said vessel at Liverpool, on the twenty-first March, one thousand eight hundred and forty-two, for the sum of five thousand two hundred and fifty-six pounds five shillings, sterling, at a credit of six months, upon which they charged a guarantee commission of four per cent, over and above a bank commission of one quarter per cent; that although part of the said price to wit, one thousand nine hundred and thirty-six pounds eight shillings and eight pence was afterwards paid in ready money, deduction being made of the interest to run, there is no proof of any usage by which a corresponding deduction ought to have been made from the commission to be charged upon the sale, or that the charge of two hundred and ten pounds five shillings, made by the said Anderson, Garrow & Co., was unusual or unwarranted:—Seeing, moreover, that this charge, even if objectionable, was not objected to in time, by the Respondent, and that the Appellant was never called upon by him to resist or oppose it; seeing also that the pretension of the Respondent, that the commission of five per cent secured to the Appellant by the said agreement was intended to include all charges to be made against the Respondent, is both unreasonable, and directly at variance with the express terms of the said agreement, and that, therefore, the first head or

item of contestation of the Respondent to the account rendered under oath by the Appellant, is insufficient, and has not been substantiated, and that the sum of two hundred and twenty six pounds five shillings and three pence, sterling, as well as the aforesaid bank commission objected to by the Respondent, by his first ground of contestation, ought to have been allowed to the Appellant in his account ; seeing that the Respondent adduced no evidence in support of the allegations in his third ground or item of contestation in the Court below, namely, that the Appellant had received the sum of thirteen per cent for the bills he drew upon England, to supply the Respondent with the sums of money agreed to be advanced to him, and even if such were the facts, it cannot establish any right in the Respondent to be credited or allowed the same rate of premium in account with him, for the bills drawn against the price of the said vessel ; seeing that the account sales of the same were only received at Quebec by the Appellant in the month of May, one thousand eight hundred and forty-two, at which time the current rate of exchange was from eight to eight and a half per cent premium, upon bills sold for cash ; that there is no proof that the Appellant drew any bills of exchange specifically against the proceeds of the said vessel ; that it is established that on or about the sixth July, one thousand eight hundred and forty-two, nearly six years prior to the institution of the Respondent's action, an account current was furnished to him by the Appellant, in which the premium on bills, for the price of the said vessel, was credited to him at eight per cent, and that he then laid claim only to a half per cent additional ; that when a similar account was at the same time furnished to Messrs. Forsyth and Bell, to whom, by the appointment of the said Respondent, any balance due to him under the said account current was to be paid, the said Forsyth and Bell made no objections to the said

rate of premium at eight per cent ; seeing that it is established that the balance of account in favor of the Respondent, was passed to the credit of the said Forsyth and Bell, upon a much larger amount due by them to the Appellant, without objection by the Respondent ; seeing further, that by reason of the subsequent bankruptcy of the said Forsyth and Bell, the difference between eight per cent premium, and any other rate up to twelve per cent as claimed by the Respondent by his said contestation, even upon the admission of his right to such higher premium, by his own act and *tacit acquiescence* would be lost to the said Appellant, if the balance of account between the parties were now disturbed, and that, therefore, the said Respondent failed to establish his third ground of contestation of the account of the said Appellant, and is not entitled to obtain the change in the said account prayed for by the Respondent in that behalf ; seeing that the sum of one hundred and fifty-two pounds, twelve shillings and five pence sterling, the subject matter of the fourth ground of contestation set up by the said Respondent to the said account of the said Appellant, formed part and parcel of the sum of seven hundred pounds sterling, which, though placed in the hands of the said Anderson, Garrow & Co., the agents of the said Appellant, to his credit, by the said Forsyth and Bell, were so placed specifically to cover the disbursements of the said vessel , "The Palestine," at Liverpool, and were distinguishable from any other funds in their hands belonging to the Appellant, personally ; that the said Anderson, Garrow & Co., were, under the agreement between the parties, the consignees of the said ship, and the sub-agents of the Respondent ; that the said Appellant had no interest whatever in the freight of the said vessel, and that by a separate agreement between the said Respondent and the said Forsyth and Bell, the cargo shipped thereon was freight free ; seeing, therefore, that the loss of the said sum of one hundred and fifty-two pounds twelve shillings and five pence, which occurred by reason of

the bankruptcy of the said Anderson, Garrow & Co., must be borne by the party who deposited the same, who was alone beneficially interested in making such deposit, and alone bound to disburse the said ship or vessel at Liverpool, and not the Appellant, and that, therefore, the said Respondent has failed to establish his fourth ground of contestation of the account of the said Appellant, and is not entitled to obtain the change in the said account prayed for, and to charge the said Appellant with the said sum ; seeing that the Respondent hath wholly failed to establish the fifth and last of the grounds of contestation by him set up to the said account, and that under the letter of the Respondent filed in this case and marked G, the Appellant became liable to the said Forsyth and Bell, for any balance of account due to the Respondent, and ceased to be liable to him for the same, and that prior to the seventeenth November one thousand eight hundred and forty-seven, the date of the assignment by Lemesurier and others, assignees of the bankrupt estate of the said Forsyth and Bell to Curtes Maranda Lampson, the balance of the said account became and was extinguished by set off or compensation between the said Appellant and the said Forsyth and Bell, and that, moreover, the said balance could not, and ought not, after the lapse of nearly six years to have been disturbed. Seeing, therefore, that in the judgment of the Court below by which the objections made by the Respondent to the said account of the Appellant, and set forth in his first, third and fourth grounds of contestation above mentioned, have been sustained, there is error : The Court doth reverse, annul, and set aside the said judgment, to wit, the judgment rendered by the Superior Court at Quebec on the twenty-fourth day of May, one thousand eight hundred and fifty-three, and this Court proceeding to render the judgment which the Court below ought to have rendered, doth overrule and set aside all, each and every the objections set up by the said Respondent, in and by his

*débats* to the account rendered by the Appellant and filed in this cause; doth maintain, pronounce and declare the said account to be correct and sufficient, and inasmuch as the Appellant hath established the satisfaction and extinguishment of the balance of the same by set off or compensation, before the institution of the action of the said Appellant, it is considered and adjudged that the Appellant have leave to go without day, with costs to the Appellant.

Ross, Sol. Gen. for Appellant.

STUART, A. for Respondent.

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BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents: Sir L. H. LAFONTAINE, Bart., Juge-en-Chef,  
PANET, AYLWIN et CARON, Juges.

{ DEMERS, (*Demandeur en Cour Inférieure,*) Appelant,  
et  
PARANT, et al. (*Déf. en Cour Inférieure,*) Intimés.

Jugé:—1o. Que les ratures et renvois dans un certificat de signification, non mentionnés, ne vident pas toujours le rapport, et que la cour, suivant les circonstances, peut maintenir tel rapport.

2o. Que dans l'espèce, sur demande en garantie d'éviction contre des cautions solidaires, le jugement doit exprimer la solidarité entre les cautions condamnées à indemniser le Demandeur.

Held:—1o. That words struck out and marginal notes in a return or certificate of seizure, not noticed therein, do not always make such return void, and the court, according to circumstances, may maintain its validity.

2o. That in the case submitted, upon an action en garantie d'éviction against joint sureties, the judgment must express that the Defendants are jointly and severally condemned to guaranty the Plaintiff.

Jugement rendu le 12 Octobre, 1854.

Demers, l'Appelant, poursuivi hypothécairement devant la Cour Supérieure à Montréal, assigna en garantie Louis Degnée dit Maréchal et Nicolas Parant, qui s'étaient portés cautions solidaires dans l'acte de vente consenti au dit Appelant, et ce dernier dans son action en garantie concluait à ce que ces deux individus fussent condamnés, *conjointement et solidairement*, à le garantir et indemniser de toutes con-

damnations qui pourraient être prononcées contre lui, en capital, intérêt, frais et accessoires, tant en demandant qu'en défendant. Les deux garants ayant comparu, prirent le fait et cause de Demers sans aucune réserve, et contestèrent la demande principale. Pendant l'instance, Louis Deguère dit Maréchal étant décédé, sa veuve, Geneviève St. Denis, en sa qualité de tutrice à Jean Bte. Deguère dit Maréchal, reprit l'instance, et le 21 Décembre, 1852, la cour rendit jugement en faveur du Demandeur principal, déclarant l'immeuble acquis par l'Appelant hypothéqué, et sur la demande en garantie condamna Nicolas Parant et Geneviève St. Denis, ès qualité, à acquitter, garantir et indemniser l'Appelant de la condamnation prononcée contre lui, avec tous les dépens.

L'Appelant interjetta appel de ce jugement sur la demande en garantie, qui ne lui accordait pas la solidarité contre les Intimés. Cet appel fut poursuivi *ex parte*, les Intimés n'ayant pas comparu.

**Sir Louis H. LaFontaine**, Juge-en-Chef : La principale difficulté en cette cause roule sur un point de procédure. L'action principale était pour le recouvrement d'un douaire, l'Appelant qui avait un cautionnement pour sûreté de son acquisition, poursuivit ses cautions en garantie, concluant contre eux solidairement. Jugement fut rendu contre les Intimés, et dans ce jugement il y a omission, des mots *conjointement et solidairement*, par erreur cléricale, sans aucun doute. L'appel a été poursuivi par défaut. Mais l'avis du cautionnement d'appel avait été donné pour le 28 Février. Les mots 28 Février, furent ensuite raturés, et remplacés en marge par *le 3 Mars prochain*. Ce renvoi est bien paraphé, mais il n'en est pas fait de mention au bas du document, et l'huiissier dans son rapport de signification ne parle aucunement de la forme de l'avis. Le cautionnement fut donné le 3 Mars ; rien ne constate que l'avocat de la partie adverse se soit présenté ce jour-là ; cependant on doit croire que

puisque le cautionnement a été reçu le 3 Mars, jour mentionné dans l'avis, le juge qui l'a reçu a dû être satisfait de la régularité de la signification. S'il devait y avoir nullité dans cet avis, ce serait faute de connaissance de l'appel. Mais il a reçu copie du writ d'appel, et d'ailleurs les faits subséquents ne permettent pas d'invoquer cette ignorance. Les griefs d'appel leur ont été signifiés. Il était alors au pouvoir des Intimés de venir devant la cour et demander remède, si l'appel ne leur avait pas été régulièrement dénoncé ; ils ne l'ont pas fait. La majorité de la cour est d'opinion que les Intimés ne souffrent point de ce défaut de forme. Je dois dire néanmoins que cette cause est jugée sur des circonstances toutes particulières, et ne devra pas servir de précédent.

Sur le mérite l'Appelant doit réussir ; il avait droit à une condamnation solidaire, et quelque faible que soit le montant de la condamnation, nous ne pouvons refuser de reformer le jugement dont est appel.

En examinant la loi je trouve dans le cas actuel tout ce qui était nécessaire. Tous les auteurs reconnaissent le droit de faire des ratures ; mais pour faire valoir ses ratures, l'Appelant a-t-il fait ce que la loi et l'usage requièrent ? Ici, quel est l'officier qui peut donner validité au document, c'est l'avocat de l'Appelant ; il a paraphé le renvoi, c'est suffisant, et il n'est pas tenu à autre chose. Il y a une autre raison applicable à la question, et qui dissipe tout scrupule qui pourrait s'offrir à l'esprit des juges ; c'est qu'en fait de procédure, la cour peut décider suivant sa discrétion. En maintenant le document dont est question, cette cour ne fera qu'exercer une discrétion saine et raisonnable ; les Intimés n'en souffriront pas, et justice sera rendue aux parties. Mais il y aurait injustice à renvoyer l'appel sur ce moyen. Cependant cette décision ne devra pas servir de règle, car les procureurs doivent savoir que les mêmes circonstances peu-

vent ne pas se rencontrer dans d'autres causes, et un jugement différent pourrait en être la conséquence.

Quant à l'objection, fait par l'honorable juge Aylwin sur le fonds, il n'en a fait mention pour la première fois que ce matin ; mais je ne me regarde pas comme appelé à juger de la nécessité ou opportunité de l'appel, mais seulement du droit de l'Appelant, et si le droit lui en appartient, je ne puis lui refuser sa demande. L'honorable juge Aylwin a prétendu que l'Appelant pouvait en Cour Inférieure se faire mettre hors de la cause ; mais ici il s'agit de sa propriété, et en se faisant mettre hors de cour, il ne pouvait se soustraire à l'éviction ; sa mise hors de cause ne pouvait avoir d'autre effet que celui de dire qu'il n'avait rien à faire dans la contestation, et pas davantage. Pour ma part, je pense que la condamnation solidaire empêchera toute litigation à l'avenir, et qu'il est plus prudent de rendre le jugement tel que demandé. La proposition légale émise par le savant juge n'est pas correcte ; il est vrai qu'en droit la garantie est indivisible et solidaire, mais quand on en vient à la liquidation, chacun n'est tenu que pour sa part virile, si le contraire n'est spécialement énoncé. Il est donc de toute nécessité d'accorder la condamnation. D'ailleurs l'Appelant ayant droit au meilleur jugement qu'il soit possible de lui donner, il n'appartient pas à la cour de le lui refuser, et nous ne devons pas nous enquérir si le jugement profitera plus ou moins à la partie qui le demande.

PANET, Juge : Je ne pense pas que la nature non approuvée soit, en général, de nature à satisfaire la cour. Elle ne peut être considérée comme authentique. Qu'on remarque bien que sans l'approbation, on peut dire que la note en marge n'a pas de date. Elle a pu être ajoutée à l'acte après sa signification. Il y aurait danger à accueillir de semblables

procédés. Néanmoins sur les autorités citées par l'honorable président qui établissent qu'on doit dans ces cas juger par les circonstances, je consens au jugement qui va être rendu. Ici la partie n'a pas souffert, elle a eu connaissance de tout ce qui s'est fait, sans réclamer, et c'est sur ces circonstances que j'ai jugé.

**AYLWIN, Juge :** Je diffère de l'opinion de la majorité de la cour, tant sur la forme de procéder, *ex parte*, que sur le fonds, et je crois devoir entrer mon dissentiment quoique l'affaire paraisse de peu d'importance. Il faut observer ici que les règles de pratiques telles que rédigées sont bien strictes. Par la 11e règle il n'est pas besoin d'acte de formalisation, pas même de demeure. Une autre règle porte que faute de réponses produites dans le délai fixé, *ipso facto* la procédure peut se faire *ex parte*. L'omission d'enfilure des factums, *ipso facto*, importe déchéance du droit de la partie. Je crois que la même rigueur doit être exercée vis-à-vis la partie Appelante, et qu'elle doit être tenue, sous peine de déchéance, de faire ses procédures dans les délais fixés par les règles de pratique, quoiqu'elle n'ait pas de contradicteur.

Sur la nécessité de la mention du renvoi dans le certificat de signification de l'avis de cautionnement, je suis d'opinion que l'omission de la mention est fatale, et sur ce point je renvoie à Toullier. (1) Quant à l'autorité de Bioche qui en fait une matière de discréption pour le juge, pour ma part je donnerais le bénéfice de cette discréption aux Intimés.

Sur le mérite, je pense que le jugement ne devrait pas être changé. L'action principale était pour un douaire poursuivi hypothécairement contre l'Appelant qui a assigné ses deux cautions qui ont pris fait et cause pour lui. L'Appelant pouvait demander d'être mis hors de cause ; il ne l'a pas fait.

(1) 8 Toullier, pp. 173 et seq.

Il a été condamné, mais en même temps les Intimés ont été condamnés à le garantir, réservant à l'Appelant à prendre des conclusions ultérieures. L'obligation de garantie est indivisible, et conséquemment emporte solidarité, (1) et d'ailleurs le jugement tel que rédigé ne peut avoir d'autre effet que celui d'une condamnation solidaire. L'Appelant ne pouvait donc s'en plaindre, et son appel était sans utilité. Il est à remarquer encore que le cautionnement des Défendeurs en garantie était limité à la somme de £750, et cependant le jugement les condamne indéfiniment, comme ayant pris le fait et cause de l'Appelant. Le jugement à mon avis devrait pour toutes ces raisons être confirmé, en autant que l'Appelant n'y est aucunement lésé.

**CARON**, Juge : Je suis de l'opinion de la majorité de la Cour et pour la forme et sur le mérite. Et d'abord, je me suis demandé ; puis-je me satisfaire que les Intimés ont été mis en état de répondre à l'appel et d'y défendre ? Ils ont reçu copie des griefs d'appel, et quoiqu'ils n'aient pas été mis en demeure d'y répondre, c'était suffisant pour leur faire connaître que l'appel était pendant. Ils ont été mis en position de s'introduire dans l'appel, mais il paraît qu'ils ont cru de leur intérêt de n'en rien faire.

Y a-t-il quelque règle tellement rigide qu'il ne soit pas possible de donner à l'Appelant le bénéfice de la discréption de la cour ? Je ne le pense pas.

Jugement infirmé.

**DOUTRE**, pour l'Appelant.

(1) Pothier, Vente, No. 105 :—1 Duvergier, No. 355 :—1 Troplong, Vente, No. 434.

## SUPERIOR COURT.—QUEBEC.

Before DUVAL, MEREDITH and CARON, Justices.

No. 1634. { LEFEBVRE dit VERMETTE, ..... Plaintiff.  
 vs.  
 TULLOCK, ..... Defendant.

Held:—That an affidavit to obtain a *Capias* contains sufficient grounds for the belief of the Defendant's departure, with a fraudulent intent, if it is stated that the Defendant refused to pay the sum sworn to be due;—that the vessel of which he is master is immediately about to sail for Europe, and that the Defendant is to sail therein. (1)

Jugé:—Qu'un affidavit pour obtenir un *Capias* contient des raisons suffisantes pour la croyance du départ du Défendeur, dans la vue de frauder le déposant, s'il y est dit que le Défendeur refuse de payer la somme alléguée être due;—que le navire dont il est capitaine est sur le point de faire voile pour l'Europe, et que le Défendeur est sur le point de faire le voyage à bord ce navire.

Judgment rendered the 26th December, 1854.

This was a motion by the Defendant to quash a *Capias* issued upon the following affidavit:—

“ Pierre Lefebvre dit Vermette, de la cité de Québec, “ arrimeur, étant dûment assermenté sur les Saints Evangiles, dépose et dit :

“ Que James Tullock, de lieux inconnus, et maintenant “ en la cité de Québec, maître et commandant de la barque “ *Saint Lawrence*, est bien et légitimement et personnellement endetté envers le déposant, en une somme excédant “ dix livres, argent courant de cette province, savoir, en la “ somme de cinquante-trois livres, argent courant susdit, “ étant une balance due au dit déposant par le dit James “ Tullock, sur la somme de soixante-et-treize livres argent “ courant susdit, laquelle dite dernière somme, étant comme “ suit, savoir: (The affidavit here alleges the work and labor performed and monies expended, in the common form, and then proceeds ;)

“ Que le dit James Tullock néglige et refuse maintenant “ de payer au dit déposant la dite somme de cinquante-trois

(1) 4. L. C., Rep. 157, Wilson vs. Reid:—*Berry vs. Dixon*, p. 218:—*Quinn vs. Atcheson*, p. 378:—*eed vide Larecque vs. Clarke*, p. 402.

" livres, argent courant susdit, due au dit déposant comme  
" susdit.

" Que ce déposant est informé, a toute raison de croire, et  
" croit sincèrement en son âme et conscience, que le dit  
" James Tullock est immédiatement sur le point de quitter  
" la province du Canada, dans le but de frauder ses créan-  
" ciers et ce déposant, et que la raison pour laquelle ce dépo-  
" sant entretient cette croyance, est que la dite barque *Saint*  
" *Lawrence* est maintenant expédiée en douane, et est immé-  
" dialement sur le point de faire voile pour l'Europe, et que  
" le dit James Tullock a lui même signé ce jour l'expédi-  
" tion en douane de la dite barque, et est embarqué, ou est  
" sur le point de s'embarquer, sur la dite barque pour faire  
" le voyage de ce port en Europe comme capitaine de la  
" dite barque, et ce déposant dit de plus que sans le bénéfice  
" d'un *Bref de Capias ad Respondendum* pour arreter le corps  
" du dit James Tullock, ce déposant court risque de perdre  
" sa créance, et souffrira des dommages."

The motion to quash was founded on the following reasons :—

*First*.—Because the affidavit made and filed in this cause upon which the *Capias* issued, contains no sufficient reason for the belief therein set forth, that the said Defendant is immediately about to leave the province of Canada with intent to defraud his creditors or the Plaintiff.

*Secondly*.—Because the said affidavit alleges that the said Defendant is not a resident of the said province, and therefore, in leaving the same, the Defendant cannot be presumed to do so with a fraudulent intent.

*Thirdly*.—Because the said affidavit contains no allegation that the said Defendant refused to pay the sum of money therein stated to be due the Plaintiff; or that the same was ever demanded of the said Defendant; or that the Defendant

had made no provision for the payment thereof, or that the Defendant had no property within the province to the knowledge of the Plaintiff.

*Fourthly.*—Because it appears by the said affidavit that the services therein alleged to have been performed, were not done at the instance or request of the Defendant.

Judgment—

“ The Court having seen and examined the proceedings “ of record, and heard the parties by their Counsel, upon the “ motion of the twenty-fifth day of November last, pursuant “ to notice, on behalf of the Defendant, James Tullock, that “ the writ of attachment, in this cause issued, be set aside “ and quashed, and that the bailbond in this cause given “ under the said writ, be delivered up to the said Defendant, “ and declared null and void, for the reasons in the said “ motion mentioned :—Considering that the affidavit in this “ cause filed contains sufficient grounds to justify the Plain- “ tiff in the belief that the Defendant was about to leave the “ province of Canada, with the intent of defrauding the said “ Plaintiff, and that, therefore, he was entitled by law to the “ writ of *Capias ad Respondendum* in this cause issued, doth “ dismiss the said motion with costs, &c.”

PLAMONDON, A. for Plaintiff.

POPE and R. POPE, for Defendant.

**BANC DE LA REINE,** { **DISTRICT DE MONTREAL.**  
**EN APPEL.**

Presents Sir L. H. LA FONTAINE, Bart., Juge-en-Chef,

PANET, AYLWIN et MEREDITH, Juges.

|                              |              |           |
|------------------------------|--------------|-----------|
| { HOWARD,<br>et<br>SABOURIN, | (Demandeur,) | Appelant. |
|                              | (Défendeur,) | Intimé.   |

Jugé :—Que dans l'espèce d'un billet daté à Montréal et payable à Albany, dans l'Etat de New York, l'avis de protét envoyé par la malle et adressé à l'endosseur à Montréal, (le protét étant fait et l'avis mis à la poste suivant les lois de l'Etat) n'est pas suffisant, les arrangements entre les deux pays relativement aux malles ne permettant pas le passage de lettres sans payment préalable d'Albany à la ligne entre les deux pays.

L'avis adressé à l'endosseur au lieu où le billet est daté est une diligence suffisante ; telle indication justifiant le porteur, lorsque l'endossement est sans restriction, de regarder ce lieu comme le domicile de l'endosseur.

Held :—That in the case of a protest of a note dated at Montreal and payable at a bank in Albany, in the State of New York, a notice of protest mailed at Albany addressed to an endorser at Montreal, (protest being made and notice mailed according to the laws of the State) is not sufficient, the postal arrangements between the two countries at the time, being such, that letters could not pass through the post without prepayment of postage from Albany to the line.

Notice sent to the endorser at the place where the note was dated is sufficient diligence ; such place being sufficient indication of the endorser's domicile, to warrant the holder in sending notice there, the endorsement being unrestricted.

**Jugement rendu le 10 Octobre, 1854.**

Les faits de la cause sont énoncés dans le rapport qui en a été fait à l'époque où cette cause fut jugée par la Cour Supérieure à Montréal. (1)

. En Cour d'Appel.

**ROBERTSON, ANDREW,** pour Appelant.

It is contended by the Appellant that there is no legal or sufficient evidence of any Law, Treaty, or authorized Postal Regulation, by which the Appellant, resident at Albany, in the State of New York, can be held bound to prepay postage on letters mailed by him. The production of copies of a Montreal newspaper, containing lists of unpaid letters remaining in the Whitehall post office, and a copy of a Depart-

(1) 2 Décisions B. C. p. 121.

mental Circular to Canadian Post Masters, not proved to have been authorized or issued by any competent authority, can impose no such liability on holders of negotiable paper, made payable in the United States.

There is no legal evidence of the duties imposed on Canadian Postmasters by the public authorities ; and no proof whatever of prepayment being required by any Law, or Postal Regulation in force within the State of New York. There is no evidence as to the letter containing the notice having been stopped at Whitehall. If it was so stopped, it must have been in virtue of some Law or Postal Regulation in force in the State of New York ; and the existence of such Law or Postal Regulation should have been shewn, and cannot in the absence of all proof, be taken for granted. This is the case, more especially since we have of record the evidence of the Notary who mailed the notice, and that of two competent witnesses, Lawyers of distinction at Albany, that the notice was duly given according to the laws of the State of New York. It is submitted that no case can be found where prepayment of postage has been held necessary to valid notice, whilst, on the contrary, the established doctrine is that "if the notice is put into the Post Office, to go by the proper post, it is wholly immaterial to the rights of the holder whether it goes by the proper post, or whether it ever reaches the party entitled to notice or not. *All that the law requires of the holder is due diligence to send the notice within the proper time, and he has done his whole duty* when he has put it into the post in due season, and it is properly directed," (1) and that the oath of the Notary that he put the notice into the Post Office, on the day of protest, is competent *and sufficient in law* to prove the fact. (2)

As to the notice being addressed to " C. Sabourin, Mont-

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(1) 2 Hill, 587 :—21 Wend, 643 :—Story, Notes, § 347.

(2) 10 Peters, Rep. 582 :—3 Esp, p. 54 :—11 East, p. 117 :—Ry. and Mood. p. 249.

real," the Court held the address sufficient, and it is submitted that in this respect the Judgment is in accordance with the authorities. (1)

It may be added that there is nothing in the pleadings or evidence of record to raise a presumption that Sabourin, at the time the notice was sent, did not reside in Montreal, except the fact that in the writ and declaration he is described as of "Longueuil." It is plain that a change of residence may have been made in the interval between the time when the note fell due, and the time the action was instituted.

In respect of the argument taken below, of the hardship of holding an indorsee liable without the clearest proof of notice, it is sufficient to say that it would be a greater hardship on the *holders of paper to oblige them to send special messengers*, or to bring home notice to indorsers. In this particular instance, the plea as to the want of notice was general, and it was not until the *enquête* of the Plaintiff was closed that the real nature of the Respondent's pretensions was made known. In an other case, No. 2524, between the same parties, an ineffectual attempt was made to be permitted to re-open the Plaintiff's *enquête*, on the ground that since it was closed, evidence had come to the knowledge of the Counsel that in fact postage was prepaid on the letters containing the notice. That the postage was actually paid does not appear in this case, nor does the contrary appear. *That the note was duly protested according to the laws of New York*, and notice to the Respondent put into the Post Office, within the time prescribed by the law of that State and of Canada, does appear, and cannot be called in question.

DOUTRE, pour l'Intimé.

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(1) 24 Wend., p. 358 :—21 Wend., p. 643 :—1 M. & R., p. 543 :—Chitty, p. 524.

L'Appelant n'ayant allégué l'existence d'aucune loi étrangère dans sa déclaration, ne pouvait faire juger la contestation d'après les lois de l'Etat de New York, et devait en toutes choses rester sous les prescriptions de nos lois.

Ce principe est consacré par tous les auteurs ; il suffit de citer là-dessus une seule autorité. (1)

D'après ce principe, l'action devait tomber quant à l'endosseur, l'Intimé, attendu que sous la loi qui régissait le pays à l'époque du protêt, ce protêt devait être fait dans l'après-midi pour être valable, et le protêt ne mentionne pas à quelle heure il a été fait. (2) La preuve qui a été faite de l'heure de la signification du protêt étant nulle, vu que l'acte devait parler pour lui-même, il résulte que de fait, il n'y a aucun protêt légal.

En supposant que la question du protêt et de l'avis de protêt dût être jugée d'après les lois de l'Etat de New York, sans que la déclaration ait dit ce qu'étaient ces lois, il est un autre principe de droit international, c'est qu'en l'absence de preuve de la différence qui existe entre les lois d'un pays et celles d'un autre, la loi présume que les lois des pays étrangers sont semblables à celles du lieu où un individu exerce son recours.

On trouve encore ce principe énoncé dans le même auteur. (3)

Or la loi du Canada oblige le porteur de payer la poste où il dépose l'avis de protêt pour lui donner de la valeur, (4) et en l'absence de preuve pour établir que la loi de l'Etat de New York est différente, on doit présumer qu'elle est la même qu'ici.

(1) *Byles on Bills*, p. 297, No. 304.

(2) 12 Vict. cap. 22, sect. 14.

(3) *Byles on Bills*, p. 297, No. 304.

(4) 12 Vict. chap. 22, sect. 11.

L'avis de protêt a été envoyé avec une telle négligence, qu'il lui était impossible d'arriver. Cette dernière raison est concluante, et ne laisse lieu à aucune difficulté.

En premier lieu, l'avis est dirigé à Montréal, à l'adresse de l'Intimé, l'endosseur, que l'Appelant, porteur du billet, connaît bien quand il s'agit de le poursuivre et qu'il sait résider à Longueuil.

En second lieu, l'Appelant ne paie pas le port de l'avis de protêt qu'il fait adresser à l'Intimé, lorsqu'il était connu de tout le monde que les relations postales qui existaient alors entre les Etats-Unis et le Canada étaient telles, qu'une lettre non payée ne pouvait pas traverser la frontière ; de sorte que, comme le disait le président de la Cour Inférieure, l'Appelant ou son notaire eut aussi bien fait de garder l'avis dans sa poche.

Or il est un principe de droit qui est commun à tous les peuples, quant aux avis qu'il faut donner des protêts de billets ou lettres de changes : c'est qu'un avis n'est considéré suffisant qu'en autant qu'on a pris les moyens raisonnables de le faire parvenir. (1)

Ce dernier motif a réuni l'unanimité des trois juges qui ont jugé la cause en première instance.

**Sir L. H. LaFontaine, Juge-en-Chef:** Action fondée sur un billet, daté à Montréal, le 21 Mai, 1850, fait par P. E. Picault, de cette ville, à l'ordre de Sabourin, l'Intimé, qui l'a endossé le même jour et au même lieu au profit de l'Appelant : le dit billet fait payable à neuf mois, au bureau d'une banque d'Albany, Etat de New York, appelée "The Mechanics and Farmers' Bank."

L'Intimé avait plaidé par exception, non seulement le défaut d'avis du protêt du billet quant à lui, mais encore le

(1) Story, on *Prom. Notes*, pp. 419, 428, 437, et seq. No. 345.

défaut même de tout protêt quelconque. Cependant il a été prouvé que le 24 Février, 1851, paiement du billet fut demandé à la banque où il avait été fait payable, à Albany, et là protesté faute de paiement.

Il est de même prouvé que l'avis de protêt a été déposé le même jour au bureau de poste d'Albany, adressé à l'Intimé, à Montréal, mais *sans que le port en ait été payé*; d'un autre côté il n'est point prouvé que cet avis soit parvenu à l'Intimé. Il résulte même de la preuve qu'il n'a point pu lui parvenir, puisqu'à l'époque où il fut envoyé, les lettres destinées pour Montréal, mises au bureau de poste d'Albany, *sans port payé d'avance jusqu'à la frontière*, ne pouvaient pas être transmises au delà de Whitehall, Etat de New York; ces lettres ne pouvaient donc pas alors entrer dans le Bas Canada. Telles étaient les conséquences des rapports alors existant entre notre gouvernement et celui des Etats Unis relativement au service des postes. Cet état de choses étant le résultat de rapports internationaux entre les deux pays, constituait un fait d'ordre public que l'Appelant, résidant à Albany, devait être censé connaître.

Le jugement de la cour de première instance, à Montréal, a condamné Picault, le souscripteur du billet, à en payer le montant à Howard, l'Appelant, mais il déboute ce dernier de sa demande contre l'endosseur, l'Intimé; la cour donnant pour *motifs* de sa décision qu'aucun avis de protêt du billet n'avait été donné à l'Intimé, que par suite des susdits rapports alors existant entre les deux gouvernements, aucune lettre dont le port jusqu'à la frontière n'était pas payé d'avance ne pouvait être transmise par la poste d'Albany à Montréal, que ce port n'avait pas été ainsi payé par le Demandeur, et qu'enfin ce dernier n'avait pas fait de diligence, ou pris de précautions raisonnables ou suffisantes, pour assurer la transmission de l'avis du protêt à Sabourin, l'Intimé. Le billet était payable à Albany, la demande du paiement et le protêt devaient être faits suivant les lois de l'Etat

de New York. Sur ce point la preuve de l'Appelant paraît satisfaisante. Il semble que l'avis du protêt pouvait *valablement* être adressé à l'Intimé à Montréal, puisque le billet et l'endossement ont été tous deux souscrits dans cette ville, et que l'Intimé par son endossement ou autrement, n'a pas eu le soin d'indiquer à l'Appelant que son domicile était à *Longueuil*, et non à Montréal. Au reste, rien ne constate que lors de la confection du billet et du protêt, l'Intimé avait son domicile dans le premier de ces deux endroits, et non dans le second.

Reste à examiner la question relative à la transmission de l'avis du protêt. Sur ce point, nous concourons dans les *motifs* donnés par la cour de première instance, et par conséquent nous sommes d'opinion que son jugement doit être maintenu.

Il est de règle certaine, passée pour ainsi dire à l'état d'axiôme, tant dans notre droit que dans celui de nos voisins, qu'en pareil cas, le porteur d'un billet à ordre, pour conserver son recours contre l'endosseur, doit user de "*due diligence*" pour faire parvenir à ce dernier, l'avis de protêt. C'est l'obligation qu'il a contractée envers l'endosseur ; et il n'est peut-être pas hors de propos de remarquer ici que l'Appelant lui-même a affirmé, dans sa déclaration, que c'était à Montréal que l'Intimé avait endossé en sa faveur, et lui avait livré, le billet en question. Or, pour remplir cette obligation, le porteur doit faire, autant que cela est en son pouvoir, tout ce qu'il sait ou est censé savoir être nécessaire pour assurer la transmission de l'avis du protêt, autrement il n'y aurait pas de sa part "*due diligence* ;" puisqu'à l'époque du dépôt de l'avis du protêt au bureau de poste d'Albany, cet avis ne pouvait pas parvenir à Montréal, à moins que le port n'en fût payé d'avance jusqu'à la frontière, ce paiement étant essentiel à sa transmission ; il faisait donc partie des "*diligences ou précautions raisonnables ou suffisantes*" que

l'Appelant devait accomplir. En supposant même que, de fait, il put ignorer l'état de choses qui rendait ce paiement nécessaire, n'était-ce pas le moins qu'on dût attendre d'un homme tant soit peu soigneux ou diligent, qu'en déposant sa lettre au bureau de poste, il s'informât s'il fallait en payer le port d'avance pour qu'elle pût franchir au moins la frontière de son propre pays? Il nous semble que cela pouvait se faire sans trop grand trouble pour l'Appelant. Nous sommes donc portés à dire, comme la cour de première instance, que, dans l'espèce, il n'y a pas eu "*due diligence*" de la part de l'Appelant dans l'envoi de l'avis du protêt à l'Intimé, puisqu'il n'en a pas payé d'avance le port, du moins jusqu'à la frontière. Peut-être même, dans les circonstances, l'Appelant était-il obligé d'en payer le port jusqu'à Montréal, aux termes de la 11e section de notre statut provincial de 1849, (1) s'il est vrai que, lorsqu'un billet est fait payable en un lieu différent de celui où il a été souscrit, l'avis à donner du protêt doit être réglé par la *lex loci contractus*, à la différence du protêt lui-même qui, en pareil cas, doit être fait suivant la loi du lieu où le dit billet est payable. (2) Mais il n'y a pas lieu d'entrer dans l'examen de cette dernière question. Il nous suffit pour la décision du présent appel d'approuver les motifs énoncés dans le jugement du tribunal de première instance. Ainsi nous disons qu'il a été bien jugé, et par conséquent l'appel est débouté.

**Jugement de la cour de première instance confirmé.**

**ROBERTSON, A. et G. pour les Appelants.**

**DOUTRE, pour l'Intimé.**

(1) 12 Vic ch. 22.

(2) Story, on Bills of Exchange, 2e Edit. p. 205, No. 176 :—5 Pardessus, Droit Com. 4e Edit. No. 1497 et suiv :—Chitty on Bills, 9th Edit. pp. 475, 476.

## VICE-ADMIRALTY COURT :—LOWER CANADA.

Before the Hon. HENRY BLACK, Judge, Vice-Admiralty Court.

THE ELECTRIC,—*Molton.*

1. Salvage. A vessel struck on Red Island shoal in the River St. Lawrence, at the end of November, 1853, and being abandoned by the crew, was subsequently carried off by the ebb tide. She was followed by four young men, who with great perseverance, courage and skill, and with great peril of their lives, forced their boat through the ice, and got on board and brought her back to the bay of Tadoussac, where she remained in safety during the winter, and until she proceeded on her voyage in the following spring. On a value of £3000 currency, the Court awarded £500 currency and costs.

2. Rule laid down by the Court respecting the production of protests, viz.: that in all cases of salvage they ought to be brought in.

1. Sauvetage. Un vaisseau échoua sur la batture de l'île Rouge dans le fleuve St. Laurent, à la fin de Novembre, 1853, et ayant été abandonné par l'équipage fut subseqüemment emporté par les glaces au reflux, et fut suivi par quatre jeunes gens, qui avec beaucoup de persévérance, de courage et d'adresse, et au grand péril de leur vie, forcer leur chaloupe à travers les glaces, s'embarquer et ramener le vaisseau à la baie de Tadoussac, où il resta en sûreté pendant l'hiver et jusqu'au printemps, lorsqu'il fit voile pour sa destination. Sur la valeur de £3000 courant, la Cour donna £500 courant et les dépens.

2. Règle établie par la Cour relative à la production des protêts, savoir: que dans les poursuites pour sauvetage tels protêts devraient être fixés.

Judgment rendered the 10th March, 1855.

This was a cause of salvage, promoted by Edward Hovington and Malcolm Hovington, and by Hubert Fraser, on behalf of his minor sons Daniel Fraser and Elzéar Fraser, for services rendered to the bark *Electric*, stranded on Red Island shoal, to the eastward of the island, on her homeward voyage in November 1853. The circumstances of the case are fully noticed in the following judgment.

Hon. HENRY BLACK :—The *Electric*, John Molton, Master, sailed from Quebec, on the 17th November 1853, on a voyage to Biddeford, a sea port in Devonshire in England, and proceeded down the river St. Lawrence as far as Red island, about one hundred and forty miles below Quebec. On the evening of the 22nd November, she grounded on Red island shoal, to the eastward of the island, the weather being at that time more than usually inclement, and the ice forming round her and upon her, so as to prevent her from

being worked, or moving. Notwithstanding the efforts of the master and crew, she remained fast during the 23rd, 24th, 25th, 26th and 27th. On the last mentioned day the master and crew left the vessel, being no longer able to endure the cold and the hardships to which they were subjected, some of them being disabled by sickness proceeding from these causes. A pilot of the name of Thomas Simard, who had come to their assistance and had been with them in the vessel, also landed with them. The crew were taken to the light house on the island, where they remained over night. On the 28th the vessel was carried off by the ice with the ebb tide, and had drifted down the river some distance, when the master and several of the crew, and this pilot, made two or three fruitless attempts to cut their way through the ice to the vessel. They then, under the advice of the same pilot, left the island and crossed over to the parish of Green island, on the main land, on the south side of the St. Lawrence, the master declaring that he believed any attempt to get to the vessel was hopeless, and thinking it possible that she might drift across the channel to Green-island. At about five o'clock the same evening Edward Hovington and Malcolm Hovington, two seamen, the former about twenty-four years of age, and the latter about nineteen, who had come over from Tadousac, on the north shore of the river, to Red island, for the purpose of rendering assistance to the *Electric*, proposed to Daniel Fraser and Elzéar Fraser, two young men, the one nineteen, and the other about fourteen years of age, to go off in a boat belonging to the Hovingtons, in pursuit of the vessel, and to make an effort to go on board, and save her if possible. They all agreed, and accordingly left Red Island about five o'clock in the evening, and by great perseverance, courage and skill, and with great peril of their lives, they forced their boat through the ice, and succeeded in getting on board, in about two hours after they had left the island, the vessel

being then about three miles below Red island, surrounded by the ice, and drifting with it and the tide. They found the hull of the vessel and deck covered with ice, the sails and rigging frozen stiff, so that it was very difficult and dangerous to attempt to navigate her, or to do any thing with her. The wind was then strong from the southwest or down the river, the night dark, and the weather very bad, with squalls and snow storms, and great cold ; and they remained on board during the night. The vessel had drifted down about eighteen miles below Red island, or nearly opposite the Esquamine islets, when at about three o'clock in the morning the wind first slackened, and then changed to the northeast with a moderate breeze, the ship nevertheless being always surrounded by ice. Taking advantage of this favorable opportunity, the salvors, with some difficulty, managed to set the sails, and direct their course up the river. Notwithstanding the difficulty of steering the vessel, the knowledge the Hovingtons had of the river, enabled them to avoid several very dangerous places, and finally to get the ship into Tadousac Bay, where they made her fast, and then stored away on shore her sails and rigging. The vessel was anchored and remained afloat all the winter, and until she was delivered to the owner in the following spring, and proceeded on her voyage. It appears that in saving the vessel the Hovingtons lost their boat, which was crushed in the ice, and that the parties were engaged in the salvage service about nineteen or twenty hours ; and the courage and skill exerted by the Hovingtons especially, were very great.

The only question to be determined is the amount to which the salvors are entitled. The several attempts at compromise, and conversations between the parties interested which have been referred to in the evidence, amount in law to nothing ; and against those parts of the evidence which

tend to decry the value of the services rendered by the salvors, the court is bound to take into consideration the fact that the protest made by the master, which would have contained a narrative of the facts when they were fresh in his memory, has not been produced; and that neither the master, the mate, nor any of the crew have been examined in the case; although it may be fairly supposed that the protest, and the evidence of these men would have been the best evidence by which the court could have been informed of the facts of the case, and of the circumstances under which the vessel was abandoned. According to the rules of proceeding in Admiralty courts, the protest in such cases ought always to be produced; and if it be not, the salvors are fairly entitled to the benefit of the inference that it is withheld because it would be too favorable to them. On this point the remarks and reasons of the present eminent judge of the High Court of Admiralty, Doctor LUSHINGTON, in the case of the *Emma* (1) are conclusive.

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(1) " In proceeding to the consideration of the case, I cannot but notice with some degree of suspicion that no protest has been produced on behalf of the owner of the vessel proceeded against. Looking to the facts and circumstances of the case itself, it is certainly a case in which according to ordinary experience, a protest would have been made, and if made it should undoubtedly have been brought in. The non production of such protest in the present instance becomes the more extraordinary when I look to the affidavits which have been sworn by the master and mate of the *Emma*, the affidavit of the latter being infinitely fuller and more comprehensive than that of the former—(Court referred to the affidavits, and proceeded to observe.) I will here avail myself of the opportunity to express my opinion with respect to the production of protests in general in this class of cases. According to my own experience in this Court, I have always understood the rule and practice of the Court to be, and I am now applying it to the cases of salvage, that the protests in all cases ought to be brought in, and for the following reasons. In the first place, because every protest is presumed to be made *recente facto*, and to contain a statement of the transaction when the facts are fresh in the memories of the parties depositing to it, whereas the discussion and legal investigation of those facts, and of the evidence taken upon them, cannot be had until a much later period, when even those who are most inclined to speak with the most perfect accuracy, as to the nature and extent of the salvage service, may find their memory fail them with respect to certain important points. This is one reason why the production of the protest is required, and ought to be observed. Another, and in my view of it a most important reason why the protest should be produced, is this, viz : that it is made and sworn *alio intuitu*. In the argument which was addressed to the Court by one of the learned counsel, Dr. Addams, this circumstance has been adverted to, and ingeniously applied as a justification for keeping the protest back upon the present occasion. I cannot, I confess, accede to the argument which was so urged upon the Court. The first and primary object for which all protests are made, is to found a claim upon the underwriters for damage done. It is clear,

The owner has paid into court, since the action was brought, £325 currency, as the salvage. This sum does not appear to the court to be sufficient. The amount must be governed by considerations of the danger to the ship, value, risk of life, skill, labor and duration of the service. The danger to the vessel was most imminent ; there does not appear to be any reasonable cause for believing that if no one had got on board, after the master, pilot and crew had left her,—or if the sails had not been set, or if she had not been steered and managed with the greatest hardihood and skill,—she would ever have been saved, or have drifted into any place where the master and crew could have boarded her again. The value of the ship and cargo is admitted to be £3000 currency. The risk of life incurred by the salvors must have been considerable ; for, they did what the master and crew had deemed it too dangerous to attempt : and the skill and labor must have been great also ; for, the salvors accomplished what the master and crew, and pilot, had abandoned all hope of accomplishing. Such being the case the duration of the service is almost immaterial to the inquiry. It is the manifest interest both of owners and insurers or underwriters of vessels to encourage every attempt to save vessels, under circumstances like those which distinguish this case. The navigation of the river St. Lawrence, at the end of the month of November, is well known to be exceedingly difficult and perilous, and in 1853 it was more than usually so. There was no obligation on the part of the young men to risk their lives in the attempt to save the vessel, more especially as there was not a living being on board, and therefore property only, and not life,

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therefore, that it is the object of the parties to state all the facts and every thing which has happened to the ship, so as to lay the foundation for the most extensive indemnification. When they come before this Court, on the other hand, for the purpose of adjusting the amount of the reward, then the state of things is reversed ; the extent of the damage is decried ; the nature and extent of the damage is depreciated. Upon these considerations therefore, it is most desirable, and much more so in cases of salvage, than in cases of collision, that the protest should always be produced." 2 W. Robinson's Rep. pp. 316, 317.

was to be saved. They were only emboldened to risk their own lives by the hope of a liberal recompense, if their enterprise succeeded. If they had failed they would have got nothing, and might have been lost or maimed in the attempt. Taking this view of the case, I think it just and right, and at the same time for the interest of the trade, and the general encouragement of similar efforts, that the salvors should receive one sixth part of the property saved, or £500 currency, together with their costs and expenses. Of the £500 I award three fifths to the Hovingtons, making £150 each, and two fifths to the Frasers, making £100 each.

Ross, Sol. Gen. and GAUTHIER, for salvors.

**STUART and VANNOVous, for owner;**

**CIRCUIT COURT.—QUEBEC.**

Before POWER, Justice.

Held:—1. That in the Circuit Court a Defendant can force a Plaintiff who neglects or refuses to file, within the delay allowed by the Statute, answers to the Defendant's pleas, after demand thereof duly made.

2. That thereupon the Defendant can inscribe the case on the Roll of *Enquêtes*, and, when one of the pleas is a *Défense au fonds en fait*, declare that he has no witnesses to examine, and he can then inscribe the case on the Roll de Droit.

**3. That the Plaintiff's action must then be dismissed, there being no proof in support of his demand.**

Jugé :—1. Que dans la Cour de Circuit un Défendeur peut forclore le Demandeur qui néglige ou refuse de filer ses réponses aux plaidoyers du Défendeur, dans le délai voulu par la loi, après ces réponses ont été demandées.

2 Qu'alors le Défendeur peut inscrire la cause sur le Rôle des Enquêtes, et, lorsqu'une Défense au fonds en fait à filée, déclarer qu'il n'entend pas examiner de témoins, et il peut ensuite inscrire sur le Rôle de Droit.

**3. Que l'action du Demandeur sera**  
**lors déboutée, faute de preuve au sou-**  
**en de la demande.**

Judgment rendered the 24th April, 1854.

This was an action *in forma pauperis* for the recovery of £30 for damages alleged to have been suffered by the Plaintiff, who had been the Defendant's Clerk, in consequence of his having been unjustifiably dismissed from the Defendant's

employ eight months before the expiration of his term. The action was instituted on the 20th September, 1852.

On the 9th November following, the Defendant pleaded, 1o. a *défense au fonds en fait*, and 2o. a Perpetual Exception peremptory in law, alleging, 1o. the misconduct of the Plaintiff, 2o. that in consequence of a reprimand for that conduct, the Plaintiff had agreed to leave the Defendant's service, and that thereupon he had been discharged and paid in full to that period.

On the 19th a demand of answers to those pleas was served upon the Plaintiff, and no answers having been given, the Defendant, on the 25th, foreclosed the former from the right of filing such answers and inscribed the case on the Roll *des Enquêtes* for the 27th, notice of which was given to the Plaintiff. On the last mentioned day the Plaintiff made default, and the Defendant moved to have his *Enquête* declared closed ; the Defendant also declared that he had no witnesses to examine, and thereupon he inscribed the cause on the Roll *de Droit* for final hearing. Before judgment was pronounced, the Plaintiff moved to take the case out of *délibéré*, and it appearing that the Clerk had omitted to enter up the Judge's order declaring the Plaintiff's *Enquête* closed, the case was struck from the Roll.

On the 23rd November, 1853, the Defendant moved for leave to inscribe the case *de novo* on the Roll *des Enquêtes*,— a very long argument took place before CARON, Justice, who held the Circuit Court on that occasion, in which the whole question of the legality of the proceeding, and the right to foreclose a Plaintiff in the Circuit Court was argued at length. As the entire matter again came before the Court on the hearing on the merits, the arguments are omitted here and given below. On the 22nd February, 1854, Mr. Justice Caron rendered judgment granting the Defendant's motion,

thus, settling the question that a Plaintiff could be foreclosed. The subsequent judgment on the merits was necessarily a consequence of that of Mr. Justice Caron.

The Defendant inscribed the case on the *Roll des Enquêtes*, giving notice of the inscription to the Plaintiff, and on the day appointed he declared that he had no witnesses to examine. The Statute, 16th Vic. Cap. 194, had been passed in the interval, taking away from the Plaintiff the right to examine witnesses. *Acte* of the Plaintiff's declaration was granted him ; and he forthwith inscribed the case for hearing.

When the argument came on the Plaintiff moved to strike the cause, as well from the *Roll de Droit* as from the *Roll des Enquêtes*.

**SECRETAN**, for Plaintiff : No power is given by the Statute to foreclose a party in the Circuit Court ; such a proceeding is confined to the Superior Court. The clause regulating proceedings in the Circuit Court merely says : " That in appealable cases the pleadings shall be in writing " and the delay for pleading, answering and replying shall " be the same as in the Superior Court," (1) but no provision made for the proceedings that are to be taken when such delay has expired. It is not said that similar proceedings shall be had thereafter as are to regulate cases in the Superior Court, and even in this latter Court, the intention can only be that a Defendant may be foreclosed, otherwise a Plaintiff's action may be dismissed virtually for want of proceedings, while he is, by law, protected from that penalty unless no proceeding shall have been had for three years. If a Plaintiff can be so foreclosed, then a new *péremption d'instance* is introduced, and that was not the intention of the Legislature. Besides, in the Superior Court, a different proceeding has been adopted ; when a Plaintiff is foreclosed, the proceeding has

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(1) 12 Vic. cap. 38 sec. 59.

been a motion by the Defendant to dismiss the action, and not as in this case, an inscription *aux Enquêtes* and afterwards an inscription on the Roll *de Droit*.

**POPE, for Defendant:** The proceedings taken by the Defendant are in conformity with the provisions of the Statute 12 Vict. cap. 38. By sec. 25, in cases in the Superior Court when the delay to plead to the declaration, or answer to the pleas, has expired, and such pleas or answers "shall not be filed, the *opposite party* may demand the same, "and if it be not filed on or before the third juridical "day after such demand, may foreclose the *party* by "whom it ought to have been filed: Provided always, that "the *party foreclosed* shall nevertheless be entitled to at "least one clear day's notice of the inscription of the case "for *Enquête* or hearing, before such *Enquête* shall be com- "menced or the cause shall be heard." Under this provision, if this cause had been pending in the Superior Court, the Defendant would have been right in resorting to his present proceeding. The power of *foreclosure* is not limited to the Plaintiff, for it is to be done by the *opposite party* to whose pleading an answer is due. The Legislature intended to create a machinery whereby a Plaintiff would be prevented from keeping a Defendant in Court for three years, and hence under this Statute he can be forced to proceed. There is no law in this country which authorizes the Court to dismiss a Plaintiff's action on a mere motion of the Defendant, if he fails to answer the Defendant's pleas, whereas the present proceeding is specially allowed by Statute.

The question before this Court, is *not* what has been done in *another* Court, but whether the proceeding *now taken in this cause* is legal and correct? By sec. 59, the delays for answering pleas in appealable cases in the Circuit Court are to be the same as in the Superior Court. By "delay" is

here meant a term after the expiration of which a party cannot do an act which he could have till then performed, but this act he could do until he was foreclosed ; and therefore that proceeding is necessary to render the Statute available ; unless this power of foreclosure be conceded, there is no "delay," no term, and the provision enacting there shall be a delay is nugatory, and the clause inoperative. By sec. 64, it is enacted "that all powers vested in the Superior Court in any suit or action pending in that Court "with regard to the adduction of evidence or with regard "to other matters relative to or connected with the conduct of such suit or action, and the proceedings therein, "shall be and all such powers are hereby vested in "the Circuit Court, and the Judges by whom the same "is to be held and in the officers of the said Court, "respectively, and may be exercised by them as fully and "effectually, and under the same provisions and conditions "of law, as if the several Acts, Ordinances and Laws conferring the said powers were herein recited and re-enacted, "and in such manner as shall be most conformable to and "consistent with the other enactments of this Act." Therefore as a Plaintiff can be foreclosed in the Superior Court, so he can be in this Court. This is a matter relative to and connected with the conduct of the action,—it is a proceeding which is legal in the Superior Court, and is therefore so in this Court, and has been exercised in a manner conformable to and consistent with the other enactments of the Act. By sec. 113, the Interpretation Act is to apply to this Statute, and it is enacted, "that all the provisions of this Statute shall "be liberally construed so as best to promote the attainment "of justice in every case, and no construction shall be "deemed right which shall leave any provision thereof without effect." Would justice be attained if the Plaintiff were allowed to keep the Defendant in Court and refuse to go on with his own case ? Let him but say he intends to

proceed, and the Defendant will at once consent to allow him to answer the pleas, and the foreclosure will be removed. If the construction contended for by the Plaintiff is correct, it will leave the clause regulating the "delay" without effect, therefore it cannot be right. Justice can only be obtained by the course the Defendant has taken. But all doubts as to the legality of this course are removed by the 16th Vict. cap. 194, by the 8th sec. of which, it is enacted, that "whereas" "in such causes and proceedings *Ex parte* it is required by "law that notice of the inscription thereof for *Enquête* be "given to the party foreclosed from pleading, and doubts "may be entertained as to the extent of the rights of such "party at the *Enquête*; that such party shall not be entitled "to adduce evidence thereat, but may cross-examine all "witnesses brought up against him, and resist the taking of "any evidence in any wise illegal or inadmissible." If a Plaintiff could not be foreclosed, the word "Defendant" and not "party" would have been used. By sec. 20, it is enacted, "that notwithstanding any thing in the 59th and 25th "sections of the 12th Vict. cap. 38, the delay for pleading, "and between the several pleadings in appealable cases "before any Circuit Court shall be five clear days only, and "not eight days, as in and by the said sections provided; "but that all the provisions of the 25th and 26th sections of "the said Act (12th Vict. cap. 38) shall apply to the said "delay of five days, in the same manner as they now apply "to the several delays of eight days." Thus then, all obscurity, if any there ever was, is removed; for the provisions of the 25th sect. expressly prescribe the *Acte* of foreclosure. The 16th Vict. cap. 194 specially applies those provisions to cases in the Circuit Court, and more than this, the Statute declares that these provisions have always applied. The Plaintiff's objections therefore fall. He was rightly foreclosed. Under the law since the 16th Vict. cap. 194, he could examine no witnesses. He has adduced no proof of

the allegations of his declaration, and his action must be dismissed. The Plaintiff ought also to be dispaupered.

POWER, Justice, having reviewed the arguments, and stated at length his reasons for the decision he had arrived at, rendered the following judgment.

The Court having heard the parties by their respective Counsel upon the motion to strike this cause from the Roll *de Droit* and the Roll *des Enquêtes*, doth dismiss the said motion, and the Court having heard the parties by their respective Counsel upon the merits of the present action, examined the proceedings, and the other documents of record in this cause filed, and upon the whole maturely deliberated, doth dispauper the Plaintiff, and there being no proof, doth dismiss the action of the Plaintiff, with costs.

SMITH and SECRETAN, for Plaintiff.

POPE, THOS. for Defendant.

#### SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MORIN and BADGLEY, Justices.

|           |                   |            |
|-----------|-------------------|------------|
| No. 1656. | { MCKENZIE, ..... | Plaintiff, |
|           |                   | vs.        |
|           | { JOLIN,.....     | Defendant. |

Held:—That a confession of Judgment to which the Defendant has set his cross, countersigned by his attorney *ad item*, is invalid and insufficient; that the Defendant must attach his signature to the confession, and if unable to sign, the confession must be made by means of a notarial instrument.

Jugé:—Qu'une confession de jugement à laquelle le Défendeur a apposé sa marque d'une croix, même quand elle est contresignée par son procureur *ad item*, n'est ni valable ni suffisante; mais que le Défendeur y doit apposer sa signature, et que s'il ne peut signer, la confession doit se faire par un acte authentique devant notaires.

Judgment rendered the 3d April, 1855.

In this case, by consent of the parties, the action was withdrawn, the Defendant giving a confession of judgment for the costs.

The Defendant accordingly made confession, and in the presence of a witness affixed his cross thereto, being unable to write or sign his name. The confession was countersigned by his Attorney *ad litem*, and accepted by the Attorney *ad litem* of the Plaintiff.

*Per curiam.* The confession in this case is insufficient. To give validity to a confession it is necessary that the Defendant should either sign his name or make confession by means of a notarial instrument.

BOWEN, Chief-Justice, dissenting :—I consider the confession in this case sufficient ; the Defendant has made his cross, and his Attorney *ad litem* has countersigned the confession, this I think is all the law requires ; the Attorney *ad litem* of the Defendant countersigning the confession, gives it, in my opinion, as much validity as if it were made before a notary.

TASCHEREAU, J. T. for Plaintiff.

GAUTHIER, F. O. for Defendant.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents : ROLLAND, PANET et AYLWIN, Juges.

|   |               |           |
|---|---------------|-----------|
| { | BROWN, .....  | Appelant, |
|   | et            |           |
| { | LAURIE, ..... | Intimée.  |

Jugé :—Que le constructeur est responsable des vices du sol, nonobstant qu'il se soit engagé à suivre certains plans et devis sous la direction d'un architecte employé par le propriétaire.

Held :—That the builder is responsible for the *vices du sol*, although he be bound by his contract to follow certain plans and specifications under the direction of an architect employed by the proprietor.

Jugement rendu le 10 Mars, 1854.

Cet appel était interjeté d'un jugement rendu par la Cour Supérieure à Montréal, le 17 Juin, 1851. (1)

(1) La cause en Cour de première instance est rapportée. 1 Décisions du B. C., p. 343.

Brown appuyait son recours en appel sur les trois propositions suivantes :

1. Le dommagement en cette cause procérait d'un *vice du sol* non apparent au temps de l'excavation, et l'Appelant, pour ne l'avoir pas alors découvert, ne pouvait être responsable des dommages qui ont pu en résulter.

2. L'Appelant, n'ayant entrepris qu'un ouvrage particulier, qu'il avait fait non seulement d'après les plans et devis qui lui avaient été fournis, mais encore sous les yeux et les ordres d'un architecte en titre, employé à cet effet par l'Intimée, et desquels plans, devis et ordres il ne s'était pas écarté, ne pouvait être tenu d'aucuns dommages éprouvés par l'Intimée. (1)

3. L'Appelant alléguait au surplus que le montant des dommages accordés par le jugement était excessif.

L'Intimé de son côté soutenait—1o. Que le constructeur devait répondre de la solidité et durée de ses constructions, *selon les règles de l'art*, et que cette responsabilité s'étendait aux *vices du sol* et qu'il n'en pouvait être libéré quoiqu'il se fut conformé aux plans et dévis, et qu'un architecte fut proposé à l'exécution d'iceux ; 2o. Que l'Appelant comme maître-maçon, devait connaître la nature du sol, sur lequel il

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(1) Domat Liv 1, Tit. IV, sect. VIII, No. IX, en note :—Pothier, *Obligations*, No. 163 :—Pothier, *Louage*, Nos. 425, 426 :—Desgodets, p. 273, sur l'Art. 203 de la Cout :—Ibid, p. 590, Art. 114 :—Ibid, p. 111, Art. 189 :—Anc. Denisart, vbo. *Bâtim. t.*, p. 302.—Nouv. Denisart, vbo. *Bâtim. t.*, § VIl, p. 312 :—Guyot, Rep. de Juris, vbo. *Architecte*, p. 231 :—Ibid, vbo. *Maçonnerie*, pp. 51, 64 :—Royer et Riolz, vbo. *Architecte*, pp. 26 et suiv :—Ibid, vbo. *Garantie*, p. 281 :—Cambrai et De la Porte, *Pandectes Françaises*, pp. 197 et suiv. Art. 1792 du Code :—Historique de l'Art. 1792 du Code Civil :—11 Troplong, No. 995, 996 :—14 Code Civil, Fenet, pp. 233 :61, 263, 264, 265, 289, 290, 292, 305, 310, 318, 320, 340 :—11 Troplong, Nos. 818, 993 jusqu'au 1002 :—17 Duranton, No. 255, p. 248.—1 Duvergier, No. 350 :—3 Delvincourt, pp. 118, 216 :—2 Lepage, *Lois des Bâtiments*, pp. 26, 31, 34, 39, 40, 44 :—Fremy Ligneville, *Code des Architectes* p. 286, 290 :—Desgodets, *Edit de Destrem*, 1815, p. 336 :—1 Fremy Ligneville, *Législ. des Bâtiments*, Nos. 118 et 119, p. 111, No. 128, p. 120 :—*Story on Buildings*, § 428 and 428 a :—*Addison on Contracts, Americ. Edit of 1847*, pp. 764, 565 193, 194.—1 Campbell, p. 38, *Fansworth vs. Garrard* :—7 East, p. 479, *Bastien vs. Butter*.

avait à poser des fondations, principe qu'il avait reconnu lui-même en faisant en quelques endroits des excavations plus profondes que celles indiquées par le devis ; que l'Intimé n'était ni qualifié ni tenu d'exercer son jugement quant à la suffisance des fondations. 3. Qu'en l'absence de règle de droit de nature à obliger le constructeur de la manière ci-dessus expliquée, l'Appelant dans le cas actuel était coupable de négligence grossière en ne prenant pas les précautions nécessaires pour s'assurer de la solidité du fonds. 4o. Que l'ouvrage sous contrat n'avait pas été complété et était au risque de l'Appelant jusqu'à sa livraison. (1) (Ce moyen n'avait pas été invoqué en Cour de première instance.)

**ROLLAND, Juge :** Il est important d'établir une règle certaine pour les architectes et constructeurs, dans l'exécution des ouvrages qui leur sont confiés. Il s'agit dans la présente cause de déterminer jusqu'où s'étend la responsabilité de l'architecte ou du constructeur, et s'ils sont tenus des dommages qui peuvent résulter des vices du sol. En France la législation nouvelle a établi des règles précises pour décider les questions qui peuvent s'élever sur ce point ; mais ces règles n'ont pas force ici. Sous le Droit Romain, il paraît que les défectuosités de l'ouvrage retombaient sur le constructeur, et celles provenant du vice du sol sur le propriétaire. Cependant l'ancien droit Français faisait retomber toute la responsabilité sur le constructeur, et rangeait les défauts provenant de la nature du sol, parmi les cas les plus défavorables, et on le jugeait ainsi, parceque le constructeur était tenu de connaître son art, et de s'assurer si le terrain était

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(1) *Loix des Bâtiments*, Desgodets et notes de Goupy, p. 480, No. 9 et p. 111, Nos. 16 :—Anc. Denisart, vbo. Bâtiment de No. 8 à 14 :—11 Guyot, Rep. de Jurisp., vbo. Maçonnerie, pp. 64, 67 :—2 Rep. de Jurisp., vbo. Bâtiment, pp. 281-3 :—Nouv. Denisart, vbo. Bâtiment, pp. 312 et suiv. :—Prost de Royer, Dict. vbo. Architecte, p. 281 :—Paillet, Code Civil, Art. 1792 p. 392 et Art. 2270 :—17 Duranton, p. 218, No. 255 :—4 Duvergier, p. 395, No. 350 :—3 Delvincourt, Cours de Droit Civil, p. 216 :—13 Pandectes Françaises par Cambray et De la Porte, p. 197 et suiv. —14 Fenet, p. 233 et 261 :—3 Troplong, Echange et Louage, p. 213, Nos. 994 et suiv. :—2 Lepage, Nouv. Desgodets du commencement :—Domat, Liv. 1. Tit. 4, sect. 7, Art. 8 et Com :—Dict. du Digeste, vbo. Location de Trav., No. 18, p. 606 :—Story on Contracts, Nos. 737, 741.

suffisamment solide pour porter les bâtiments à ériger. La seule restriction apportée à cette garantie était quant à sa durée, qui était limitée à dix ans. Dans cette cause il y a eu un architecte employé, et l'entrepreneur voudrait faire retomber sur lui la responsabilité, vu que cet architecte avait, non seulement à voir à l'exécution de ses plans, mais de plus, à surveiller tout l'ouvrage. En recourant au Nouveau Denisart (1) on voit qu'il était d'usage d'employer un architecte, lorsque la bâtie est de quelque importance, mais un peu plus loin, l'auteur ajoute que, dans le cas de quelque défaut dans la construction, la responsabilité retombe non seulement sur les maçons et constructeurs, mais encore sur l'architecte. Je trouve en effet bien des cas où ils ont été déclarés responsables, mais aucun où ils aient été libérés. Ceci peut-être dû à ce que l'architecte avait lui-même employé les ouvriers, et était devenu par là responsable envers le propriétaire. Mais dans le cas actuel, le propriétaire a contracté directement avec le constructeur qui s'est obligé de suivre les plans d'un architecte, et par là est devenu responsable au propriétaire ; ce qui n'empêche pas l'architecte d'être responsable conjointement et solidairement avec le constructeur, car tous deux devaient connaître leur art, et le propriétaire qui veut bâtir n'est pas censé connaître si le sol est de nature à supporter les fondations. Ici le vice du sol est clairement prouvé, et le jugement rendu en Cour Inférieure doit être maintenu. Je référerai sur ce sujet au Nouv. Denisart, (2) et Duvergier (3) s'appuyant sur Pothier, établit que la perte partielle ou totale de la bâtie est au risque du constructeur, soit qu'elle procède des défauts de l'ouvrage ou du vice du sol.

PANET, Juge : Pour ma part j'irais même plus loin que l'honorable Président de la cour, son opinion est basée sur le fait que la perte était prouvée être la conséquence du vice du sol, suivant moi cette preuve n'était pas nécessaire,

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(1) N. Denisart, vbo. Bâtiment, Nos. 3, 5, 9.

(2) Nouv. Denisart, vbo. Bâtiment, Nos. 3, 5, 7.

(3) Duvergier, Louage, No. 348.

et le constructeur, est responsable de tous les vices qui peuvent se rencontrer, et qu'il ne prouve pas provenir de force majeure ou du fait même du propriétaire. (1) Ici l'entrepreneur n'a pas pris les précautions nécessaires, et il est conséquemment responsable.

**AYLWIN**, Juge : Le droit Romain faisait une distinction entre l'ouvrage fait *per aversionem*, et celui fait à la mesure, le constructeur était responsable jusqu'à ce que l'ouvrage eût été reçu dans le premier, ou mesuré dans le second cas. Le droit français a été plus loin en rendant le constructeur responsable, même après la réception de l'ouvrage, tant pour les vices de l'ouvrage que pour ceux du sol. Dans le cas actuel l'Appelant a allégué qu'un autre individu était garant des vices du sol ; mais ceci ne peut l'exonérer.

Cet entrepreneur peut être étranger et peu au fait de nos loix, et a pu croire que l'interposition d'un architecte dont il devait suivre les ordres avait l'effet de le libérer de la garantie des ouvrages, cette décision pourra paraître dure à son égard. Il est à espérer que ce jugement sera rendu notoire, surtout dans ce tems où grand nombre de constructions se fond chaque jour ; et si les gens font des marchés qui entraînent la responsabilité que nous déclarons aujourd'hui, ils le feront en connaissance de cause.

Le jugement de la cour supérieure est confirmé.

**BETHUNE et DUNKIN**, pour l'Appelant.

**Cross**, pour l'Intimé.

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(1) Laharie. Code Civil, Art. 1792, p. 477 :—2 Lepage, Loix des Bâtiments, p. 77.

BANC DE LA REINE. } DISTRICT DE MONTREAL.  
EN APPEL.

Présents : ROLLAND, PANET et AYLWIN, Juges.

|   |                                                               |
|---|---------------------------------------------------------------|
| { | DEWITT, ( <i>Opposant en Cour Inférieure,</i> ) Appelant.     |
|   | et                                                            |
| { | BURROUGHS, ( <i>Requérant pour Lettres de Ratification,</i> ) |
|   | Intimé.                                                       |

Jugé :—1. Que sur un appel il n'est besoin d'assigner que les parties intéressées dans la contestation soulevée.

2. Que dans le cas d'une demande en ratification d'un acte de vente de plusieurs lots, (affectés à des charges et hypothèques distinctes) pour un seul prix, les créanciers hypothécaires ne peuvent être forcés de surenchérir qu'après que le prix de chaque lot a été établi par ventilation, et qu'avant telle ventilation, le Requérant ne peut obtenir ratification de son titre.

3. La ventilation doit être homologuée avant que la distribution des deniers déposés puisse être faite. (1)

Held :—1. That the parties interested in the contestation or issue joined, are alone to be made parties to an appeal.

2. That in a demand for ratification of a deed of sale of several lots of ground, (affected with distinct charges and mortgages) for one price, the hypothecary creditors cannot be foreclosed from overbidding until the price of each lot has been determined by a ventilation, and that the Petitioner cannot obtain the ratification of his title until such ventilation has taken place.

3. This ventilation must be homologated by the Court before the monies deposited can be distributed.

Jugement rendu le 12 Octobre, 1853.

L'Intimé en cette cause demandait en Cour Inférieure la ratification d'un acte de vente à lui consenti par Félix Mercure, le 28 Novembre, 1850, devant Jobin, notaire, de trois lots de terre, décrits en icelui, et un droit de passage en arrière des lots susdits. Le prix ou considération de cette vente consistait : 1o. en une rente annuelle et viagère de £40 par an en faveur de Dame Pélagie Morin, payable par quartier, le premier échéant au 25 Février, 1851 ; 2o. une somme de £300 payable au vendeur en neuf mois par installations de £100 tous les trois mois ; 3o. une rente constituée de £22 17 2½ payable annuellement à Alexis Laframboise ou représentants ; 4o. une autre rente constituée de £4 6 4 à Louis Comte et ux ; 5o. enfin une rente constituée de £3 15 à Ol. Berthelet. La dite Pélagie Morin, de qui Mercure tenait deux des héritages en question par un acte de

(1) Même décision rendue le même jour dans un autre appel de Dewitt, Appelant, et Comte, Intimé ; Et aussi dans une autre cause de Dewitt, Appelant, et Bro et Burroughs, Intimés, jugée le 10 Mars, 1854.

donation du 30 Octobre, 1839, était partie à cet acte, et déchargea par icelui l'acquéreur de tous les arrérages de rente qui lui étaient dus, et l'accepta comme débiteur personnel sans déroger aux priviléges résultant de l'acte de donation.

Plusieurs oppositions furent faite à cette demande en ratification par des créanciers ayant des priviléges ou hypothèques sur quelqu'un ou chacun des héritages ainsi acquis par l'Intimé ; de ce nombre était l'Appelant qui réclamait à titre de créancier de Pélagie Morin, comme débitrice principale du dit Félix Mercure, en vertu d'un jugement sur saisie-arrêt, condamnant ce dernier à payer à l'Appelant £90 pour arrérages que Mercure avait reconnus devoir à la dite Pélagie Morin sur la rente viagère due à raison de la donation qu'elle avait faite à Mercure comme susdit. Cette créance n'était pas contestée.

Le 10 Mai, 1851, l'Intimé fit motion pour acte de la consignation, qu'il faisait entre les mains du Protonotaire de la somme de £300, "montant du prix stipulé dans son acte "d'acquisition, aux fins d'obtenir un titre de ratification libre "de toutes hypothèques, excepté de celles d'Alexis Laframboise, d'Olivier Berthelet et de Louis Comte et sa femme."

Le 17 Mai, 1851, il demandait acte d'un autre dépôt de £71 18 9 dans le but de libérer les dits immeubles de la rente de £4 6 4, payable comme il est dit plus haut à Louis Comte et sa femme, étant le principal de la dite rente, tel que porté en leur opposition.

Puis il inscrivit la cause pour jugement de ratification, vu les dépôts susdits, à la charge seulement des rentes en faveur des sus-nommés Laframboise, Berthelet et Pélagie Morin.

Le 22 Juillet, 1851, jugement fut prononcé conformément à la demande de l'Intimé, reconnaissant la destination spéciale du dépôt de £71 18 9.

Le 4 Septembre, 1851, intervint un interlocutoire ordonnant une ventilation et évaluation de chacun des dits héritages et droit de passage, avec un état montrant *quelle portion du prix total devait être allouée comme représentant la valeur de chaque lot, à proportion du prix total convenu sur la totalité de la vente.*

Un seul expert nommé à cet effet par les parties estima les 4 lots à £1740, et alloua à chacun des lots une somme proportionnelle dans les £371 18 9, sans tenir compte des rentes constituées et viagères dont quelques lots étaient respectivement grevés.

Ce rapport fait, et sans qu'il eût été homologué sur la demande de l'Intimé, il fut préparé par le Greffier un projet de distribution des deniers consignés, savoir de la dite somme de £371 18 9.

Plusieurs contestations furent produites à l'encontre de ce projet de distribution. Une faite par l'Appelant fut rejetée comme ayant été produite après les délais fixés par les Règles de Pratique, et le projet de distribution fut homologué.

Contre ce jugement l'Appelant se pourvut en appel. Il est inutile de relater ici les griefs qu'il articulait contre le jugement, et contre quelques-uns des procédés ci-dessus énoncés, en autant que la cour n'a pas prononcé d'opinion sur ces griefs, et a maintenu l'appel sur un moyen que l'Appelant n'avait pas invoqué d'une manière explicite.

L'Intimé seul assigné en appel fit motion pour le faire rejeter en autant que d'autres parties opposantes en cause sur la distribution n'avaient pas été en même temps que lui assignées en appel. Le 8 Mars, 1853, cette motion fut rejetée en autant que l'appel ne touchait qu'à la contestation liée entre l'Appelant et l'Intimé, contestation dans laquelle les autres parties ne pouvaient intervenir, et n'avaient aucun intérêt.

**AYLWIN, Juge :** La question ici s'élève sur une requête en vertu de la 9e Geo. 4, pour obtenir la ratification d'un acte translatif de propriété de 4 lots de terre vendus pour un seul prix, £300, et à la charge de certaines rentes constituées et viagères mentionnées dans l'acte. L'Appelant par opposition réclamait comme créancier de Mercure une hypothèque sur les lots Nos. 1 et 4. Le Requérant (l'Intimé) se prévalant d'une disposition du Statut ci-dessus mentionné déposa £300, puis plus tard une autre somme de £71. Se croyant par là en droit d'invoquer la décharge ou libération pourvue par la loi. Burroughs prétend que le seul prix de vente était la somme de £300, pourquoi alors a-t-il déposé les £71 ? La véritable considération de la vente était, dans l'opinion de la cour, les £300, les capitaux des rentes constituées et la valeur de la rente viagère stipulée dans l'acte.

Sous l'opération du Statut tout créancier hypothécaire, s'il croit que la vente dont on demande la ratification peut lui préjudicier, a droit de venir en cour et mettre enchère et surenchère sur le prix porté en l'acte dont la ratification est demandé ; c'est là un droit assuré aux créanciers et dont ils ne peuvent être frustrés par le Requérant. C'est néanmoins ce à quoi ils sont exposés dans le cas actuel, car au lieu de stipuler un prix certain pour chaque lot en particulier, de manière à mettre ainsi les créanciers hypothécaires sur chacun des lots respectivement en état de surenchérir, l'Intimé a stipulé un seul prix et une seule et même considération pour tous les lots. Les créanciers d'un seul ou de quelqu'un des dits lots seulement, se trouvaient par là hors d'état de surenchérir, ne connaissant pas la valeur attribuée à chacun des lots, si bien que lorsqu'il s'est agi de distribuer les sommes déposées il a fallu procéder à une ventilation pour établir cette valeur de chaque lot isolé. Néanmoins Burroughs, avant cette ventilation, obtient jugement de confirmation de son titre, et avant que le rapport de ventilation ait été homologué il fait

préparer et produire un rapport de distribution des deniers par lui déposés. Ce dernier procédé était prématuré, et on ne pouvait l'adopter avant que la valeur de chaque lot eut été constatée, et cette ventilation ne pouvait avoir d'effet, avant qu'elle eut reçue la sanction de la cour. Le jugement de ratification et de distribution sont donc prématurés et doivent être déclarés tels. Les règles de pratique sur l'affiche ne viennent pas en question ici, et les acquiescement de l'Appelant que l'Intimé a invoqués n'existent pas. Les reçus d'avis que l'Appelant a donnés ne peuvent le priver de son droit ni de son recours. Il n'est pas moins singulier de voir que par le jugement de distribution l'Intimé qui n'a rien demandé, doit recevoir £92.

Le jugement de ratification et le jugement de distribution sont en conséquence mis au néant, et seront sans effet entre Dewitt et Burroughs. Je dois aussi observer que le projet de ventilation de Glackemeyer n'est pas satisfaisant ni conforme à ce qui était requis par la règle qui le nommait, et sur ce point les parties intéressées pouvaient avoir des raisons à opposer à son homologation.

PANET, Juge : La décision de la cour pourra peut-être paraître une anomalie, vu que par là les parties auront pour enchérir et surenchérir plus que les quatre mois fixés par le Statut. Mais sur un acte d'échange, par exemple, il n'y a pas de possibilité d'encherir si l'acquéreur n'a pas par son acte établi la valeur du terrain par lui acquis. Dans ces circonstances les créanciers ne peuvent être frustrés, et le seul moyen de les sauvegarder est de leur assurer ce droit d'encherir après que la valeur du terrain aura été constatée, et l'acquéreur ne pourra s'en prendre qu'à lui même s'il lui en résulte quelque désavantage.

“ La cour, etc. Vu que le rapport de distribution de deniers dressé par le protonotaire de la dite Cour Supérieure a été produit et mis de record, avant l’homologation de la ventilation faite par Frédéric Glackemeyer, expert nommé à cette fin, et, partant, est prématûré, et que toute la procédure sur le dit rapport est devenue vicieuse : La cour casse et infirme les jugements dont est appel, savoir, les jugements de la dite Cour Supérieure rendus les 22 Juillet, 1851, 21 Octobre, 1851, et 14 Avril, 1852, et faisant droit sur l’appel du dit Jacob Dewitt met le dit rapport au néant, et remet les parties en cette cause au même et semblable état qu’elles étaient lors de la production et enfilure du dit rapport.”

CHERRIER, DORION et DORION, pour l’Appelant.

ROSE et MONK, pour l’Intimé.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents : Sir L. H. LA FONTAINE, Bart., Juge-en-Chef,  
AYLWIN et CARON, Juges.

|                 |           |
|-----------------|-----------|
| { ROLLAND,..... | Appelant, |
|                 | et        |
| { LAREAU,.....  | Intimé.   |

Jugé :—1. Que de deux voies différentes de faire une acquisition, il est permis de choisir celle qui est exempte, ou moins productive, de droits seigneuriaux, pourvu que la convention soit sérieuse et sincère, et non simulée.

2. Que dans l’espèce il y avait simulation, en ce que l’échange était dit avoir été fait sans soultre, tandis qu’il a été constaté par la preuve qu’il y avait de fait eu soultre de 11,000 francs ; que l’échange étant mêlé de vente, il y avait jusqu’à concurrence de la soultre, ouverture aux profits de lods et ventes.

Held :—1. That it is lawful, if there are two different means of effecting a purchase of land, to adopt that which is free from, or less productive of, seigniorial dues, provided the contract be serious and made in good faith and without deceit.

2. That in the case submitted, there was deceit inasmuch as the exchange was said to have been made without any return (*soultre*), whereas it was in evidence that a *soultre* of 11,000 francs was stipulated ; that the exchange being thus mixed with sale, *lods et ventes* had accrued and were due on the said *soultre*.

Jugement rendu le 12 Mars, 1855.

Sir L. H. LA FONTAINE, Bart., Juge-en-Chef : En Septembre, 1852, l’Appelant, Seigneur de Monnoir, a porté contre l’Inti-

mé, à la Cour de Circuit siégeant à St. Jean, une action pour lods et ventes, £45 2 9, qu'il réclamait sur l'acquisition d'une terre faite dans sa censive par l'Intimé, du nommé Augustin Guertin ; acquisition qu'il prétend avoir été faite, à *titre de vente*, pour le prix de 13,000 livres, ancien cours.

La déclaration de l'Appelant fait mention de trois actes notariés comme concernant cette transaction ; ils sont produits dans la cause. L'Appelant soutient qu'ils sont simulés, et comme tels, passés dans le but de le priver frauduleusement des lods et ventes auxquels cette acquisition de l'Intimé a dû donner ouverture à son profit.

Le premier de ces actes est du 10 Mai, 1852. C'est une vente par le nommé Joseph Russell à l'Intimé, pour le prix de £350, d'une terre située dans le Township de Farnham. L'acte constate que l'acheteur a payé £100 comptant, et que la balance du prix a été stipulée payable £100 en Avril, 1853, £100 en Avril, 1854, et £50 en Avril, 1855, avec intérêt chaque année.

Le second acte qui est du 17 Mai, 1852, (portant No. 1200 des minutes du notaire) est un acte d'échange entre l'Intimé et le dit Augustin Guertin. Le premier donne en échange au second la terre de Farnham, et en reçoit en contre-échange la terre de Monnoir. Il est énoncé dans l'acte, que cet échange est fait "sans aucune soulté ni retour."

Enfin le troisième de ces actes est du même jour que l'acte d'échange, c'est-à-dire, du 17 Mai, 1852, passé immédiatement après celui-ci, puisqu'il porte le No. 1201 des minutes du notaire qui les a reçus. C'est un acte d'*obligation réciproque* entre les deux mêmes parties. L'Intimé reconnaît devoir à Guertin la somme de 11,000 francs pour *valeur reçue*, payable en dix paiements annuels de 1,100 livres chaque, échéant en Mars, avec intérêt sur le tout à compter de 1er Août, 1852. De son côté, Guertin s'oblige de payer à

Russell, "à l'acquit" de l'Intimé, "et à même la somme de 11,000 livres, dit cours, ci-haut mentionnée" la balance du prix de vente que ce dernier devait à Russell, laquelle balance est par erreur portée dans cette obligation à 6,400 francs, tandis que de fait elle n'était que de six mille francs.

Russell n'a été partie ni à l'un ni à l'autre de ces actes du 17 Mai, 1852.

Pour appuyer son énoncé de *simulation*, l'Appelant a commencé par exposer dans sa déclaration, que vers le 1 Avril, 1852, l'Intimé était convenu avec Guertin d'acheter sa terre de Monnoir pour le prix de 13,000 francs, convention dont il aurait été rédigé acte. C'était réellement, dit-il, un acte de vente, mais les parties le qualifièrent seulement de promesse de vente, et le tinrent secret dans le but de le priver frauduleusement de ses lods sur cette vente. Puis il ajoute que vers le 1er Mai suivant, l'Intimé prit possession de la terre de Monnoir en vertu de cette vente, et qu'il l'a toujours possédée depuis ; que quelque temps avant le 10 Mai, afin de mieux exécuter leur plan de frauder l'Appelant de ses lods et ventes, l'Intimé et Guertin arrêtèrent ce qui suit : l'Intimé devait faire de Russell un achat *simulé* de la terre de Farnham pour £350, (Guertin ayant déjà lui-même réellement acheté, ou étant convenu d'acheter cette terre) ; payer en à compte à Russell 2,000 francs à même les 13,000 francs, prix de la terre de Monnoir ; s'en faire passer en son propre nom, par Russell, un acte de vente *simulé* ; puis faire alors avec Guertin un acte d'échange, également *simulé*, des deux terres dont il s'agit ; et enfin contracter, par acte séparé, l'obligation de payer à Guertin la balance de 11,000 francs ; celui-ci devant, de son côté, s'engager par le même acte à payer à Russell la balance à lui due sur la terre de Farnham, et de garantir l'Intimé contre toute réclamation de la part de Russell à cet égard. L'Appelant ajoute qu'en exécution de ce plan, l'Intimé passa avec Rursell l'acte de vente simulé

du 10 Mai, lui paya en à compte 2,000 francs, (et de plus une somme de 400 francs,) qui fut, dit-il, avancé pour cela par Guertin, formant ensemble la somme de £100 reconnue, par cet acte, avoir été payée à Russell; et que c'est dans le même but que furent passés l'acte d'échange et l'acte d'obligation du 17 Mai. De là la prétention de l'Appelant que ces trois actes sont faux et *simulés*, et que, quant à lui, en fraude de qui ils ont été passés, ils doivent être regardés comme non avenus. Puis il conclut purement et simplement au paiement de la dite somme de £45 2 9 pour lods et ventes.

Dans sa "défense" à l'action, l'Intimé nie avoir fait de Guertin l'acquisition de sa terre de Monnoir *à titre de vente* ainsi qu'articulé dans la déclaration de l'Appelant. Il dit qu'il a fait cette acquisition au moyen du susdit acte d'échange du 17 Mai, à charge d'une soulte ou retour de £283 3 4, sur laquelle soulte il doit à l'Appelant les lods et ventes (lesquels, par erreur, il ne porte qu'à la somme de £16, puisque ces lods formeraient £23 11 11.) Il ajoute qu'il a déjà offert, et il offre de nouveau de payer cette somme de £16 à l'Appelant. Il nie les actes de fraude ou de collusion que celui-ci reproche aux parties. Enfin, il allègue n'être entré en possession de la terre de Monnoir qu'après l'acte d'échange.

L'Intimé a été interrogé sur faits et articles, et quelques témoins ont été examinés de part et d'autre.

Le jugement de la Cour de Circuit a condamné l'Intimé à payer à l'Appelant la susdite somme de £23 11 11 "montant des lods et ventes," est-il dit, "dus par le Défendeur "au Demandeur sur la soulte de £283 3 4 que le dit Défendeur a, par ses défenses, admis avoir promis payer au "nommé Augustin Guertin sur l'échange mentionné en la "déclaration en cette cause."

Sur appel porté par le Demandeur à la Cour Supérieure, ce jugement a été confirmé.

Ces deux jugements ne sont pas *motivés*.

L'examen que j'ai fait du témoignage et des réponses de l'Intimé aux interrogatoires sur faits et articles, me porte à dire que l'Appelant a sailli dans la preuve qu'il avait à faire pour soutenir l'énoncé, tant de l'existence d'une vente de la terre de Monnoir par Guertin à l'Intimé, vers le 1er Avril, 1852, pour le prix de 13,000 francs, que d'une prise de possession de la dite terre par l'Intimé vers le 1er Mai suivant, c'est-à-dire, avant la passation des trois actes en question. Pour établir ces deux faits, il paraît que l'Appelant n'a pas eu d'autre preuve à offrir que celle qui pouvait résulter de l'examen de l'Intimé sur faits et articles. Or, c'est en vain qu'il en appellerait aux réponses de l'Intimé pour nous y montrer, même par induction, l'aveu de cette vente et de cette prise de possession. Au 1er interrogatoire qui est en ces termes : "N'est-il pas vrai qu'en Avril, 1852, ou vers "le 1er jour de ce mois, vous avez fait convention avec un "nommé Augustin Guertin d'acheter de lui la terre men- "tionnée dans la déclaration du Demandeur, et qui est située "dans la seigneurie de Monnoir, pour le prix ou somme de "13,000 livres ancien cours, et que là vous êtes convenu "d'en passer acte devant Mtre. Lesage, notaire de St. Gré- "goire ?"

L'Intimé répond "Non."

Au second interrogatoire tendant à prouver la rédaction par écrit de cette prétendue convention, il donne encore dans la négative la même réponse laconique. Mais aux deux questions qui suivent immédiatement, et qui sont proposées dans un but semblable, il répond : "3. Nous avons, Guertin "et moi, signé chez Lesage un acte nullement relatif à la "vente, mais bien à l'échange de la dite terre." 4. "L'acte "que j'ai signé avec Guertin, comme je l'ai dit plus haut, "était pour un autre objet que pour la vente de la dite terre, "et m'a été remis, et depuis je l'ai détruit." Et au 7<sup>e</sup> inter-

rogatoire, il répond : "Je ne suis en possession de la terre "en question que depuis le 17 Mai, 1852," c'est-à-dire, postérieurement à l'acte d'échange.

La preuve testimoniale n'est pas, non-plus, de nature à venir au secours de l'Appelant pour établir l'existence de la vente qu'il allègue avoir été faite le 1er Avril, 1852. On ne saurait non-plus, pour en déduire une preuve légale de cette existence, argumenter du fait invoqué par l'Appelant, fait isolé et peu important en lui-même, que dans l'acte d'obligation du 17 Mai, l'intérêt a été stipulé payable *à compter du 1er Avril, 1852.*

L'Appelant ayant failli dans la preuve de cette vente, il semblerait qu'il ne lui reste plus rien pour justifier l'énoncé de *simulation* de contrat. Les actes qui sont présentés sont, d'après la preuve, les seuls qui existent entre les parties, et sont les seuls qui, du moins entr'elles, doivent régler les droits et obligations réciproques résultant de leurs acquisitions respectives. Quant à l'acte de vente du 10 Mai, il est évident que dans l'état de la cause il ne peut pas être regardé comme un acte *simulé*. C'est le seul titre qui subsiste entre l'Intimé et Russell ; le seul qui, d'un côté a rendu l'Intimé, et non Guertin, propriétaire de la terre de Farnham ; et qui, de l'autre a rendu Russell créancier de l'Intimé et non de Guertin, du prix de vente de cette terre. L'acte constate que c'est l'Intimé lui-même qui a payé à Russell la somme de £100 en à compte de ce prix de vente ; il n'y a pas la moindre preuve que Guertin ait contribué à ce paiement. Russell a encore droit d'action personnelle contre l'Intimé pour la balance qui lui est due, et cela uniquement en vertu de l'acte du 10 Mai, 1852. Cet acte est donc sérieux et sincère. Il n'y a donc pas de *simulation*, puisqu'il n'y a pas d'opposition du *Gestum* et du *Scriptum*,

qui est en effet " la marque distinctive des actes simulés qui " ont lieu, lorsque, sous l'apparence d'un acte ostensible, les " parties agissent dans la vue d'exécuter une autre conven- " tion." (1)

En est-il de même de l'acte d'échange entre l'Intimé et Guertin? Il est bien vrai que c'est l'acte en vertu duquel l'un a acquis la terre de Monnoir, et l'autre la terre de Farnham. L'Intimé dit à l'Appelant: C'est mon titre à la propriété de la terre de Monnoir, je n'en ai pas d'autre; et empruntant le langage du Nouveau Denisart, il ajoute: "Lorsqu'une même action, un même acte, est permis par "les lois, de deux manières différentes, on peut sans fraude "choisir le parti le plus avantageux, quand même ce choix "serait cause qu'un tiers aurait moins de bénéfice." (2) En d'autres mots, il dit: *il est permis de frauder le Seigneur*, cela est vrai; l'Appelant l'admet lui-même pour ainsi dire dans son *Factum*; c'est ce qu'on appelle la "Fraude Normande." (3) Mais, aussi, selon le même auteur, pour que le Seigneur ne puisse prétendre que j'aie contracté en fraude de ses droits, il faut que le contrat d'échange soit sincère et véritable; il y a fraude, dit-il, si mon contrat d'échange est simulé, si ma convention est un véritable achat déguisé sous le nom d'échange. Il faut qu'il n'y ait ni achat ni vente, mais un simple échange. Si l'Intimé est dans cette condition, si le titre d'acquisition qu'il présente est vraiment un échange pur et simple, fait "sans aucune soule ni retour" selon la déclaration des échangistes en l'acte du 17 Mai, alors nul doute que les prétentions de l'Appelant ne soient mal fondées. Car, comme dans le cas de la vente du 10 Mai, il n'y aurait pas de *simulation* dans cet acte d'échange

(1) Championnière et Rigaud, Droits d'Enregistrement, No. 96:—Proudhon, de l'Usurfruit, No. 104.

(2) Nouv. Denisart, vbo *Fraude*.

(3) 7 Rép. de Jurisp. vbo. *Fraude*, pp. 655 à 658;—3 Guyot, *Traité des Fiefs*, pp. 234 et 235:—2 Fonmaur, arts. 786 et 787:—3 Hervé, p. 143:—Championnière et Rigaud, des Droits d'Enregistrement, Nos. 96 à 100:—1 Solon, des Nullités, p. 144, Nos. 243, 244, 245:—2 Chardon, du Dol, Nos. 3 et 4.

puisque le *gestum* ne serait pas contraire au *scriptum*. Mai : l'Appelant a fait lui-même l'aveu, depuis la passation de l'acte du 17 Mai, que son titre d'acquisition de la terre de Monnoir n'est pas né d'un contrat d'échange pur et simple fait but à but, mais bien d'un contrat d'échange *mélé de vente*, puisqu'il a admis qu'il y avait eu soulte ou retour de sa part en faveur de Guertin. Il y a donc, jusqu'à concurrence de cette soulte, quelle qu'elle soit, *aliud actum quam scriptum*; ce qui constitue la *simulation*, cette espèce de fraude dont le Seigneur a droit de se plaindre, puisque le contrat qu'on lui a présenté comme étant un simple échange, n'est pas celui que les parties ont *in veritate et in effectu* passé. Il ne constitue pas le titre véritable de l'Intimé à la propriété de la terre de Monnoir, au contraire, il est clairement démontré que ce titre, tout en dérivant de l'acte du 17 Mai, repose sur un contrat d'échange *mélé de vente*; contrat qui, par conséquent, a donné ouverture à des lods sur le montant de la soulte.

Ce montant est-il celui dont l'Intimé, avant l'action, a fait l'aveu à l'agent de l'Appelant, et ensuite dans sa "défense" à l'action? Ou n'est-il pas plutôt de la somme de 11,000 francs que, dans l'acte d'obligation du 17 Mai, l'Intimé a reconnu devoir à Guertin pour valeur reçue? A mon avis, il y a preuve suffisante que, d'après les conventions des parties, ce dernier chiffre est celui de la soulte véritable dont il s'agit, et qui, jusqu'à due concurrence, donne à leur contrat le caractère de la vente. Cette preuve résulte : 1o. de l'acte d'obligation du 17 Mai, par lequel l'Intimé, d'un côté, reconnaît devoir à Guertin cette somme de 11,000 francs pour *valeur reçue*, et par lequel même acte Guertin, de son côté, s'oblige de payer à Russell, à l'acquit de l'Intimé, "et à même la somme de 11,000 francs, dit cours, ci-haut mentionnée," la balance du prix de vente que l'Intimé devait encore à Russell; 2o. des réponses de l'Intimé aux Interrogatoires sur faits et articles, et plus particulièrement de ses réponses

aux 10<sup>e</sup> et 11<sup>e</sup> des dits interrogatoires, lesquelles comportent clairement un aveu de sa part, que son obligation de payer à Guertin la somme de 11,000 francs, est née de l'acquisition qu'il a faite de lui de sa terre de Monnoir par l'acte d'échange du 17 Mai, et n'a pas eu, par conséquent, d'autre cause que la susdite soulte : d'où il faut nécessairement conclure que c'est cette même soulte qui seule a motivé le "valeur reçue" énoncé dans le dit acte d'obligation.

L'Appelant en faisant ainsi connaître la véritable nature du titre d'acquisition de l'Intimé, laquelle avait été déguisée dans l'acte du 17 Mai, a donc établi que ce titre, du moins quant à lui, comme seigneur, et vis-à-vis de l'Intimé, repose sur un contrat d'échange réellement *mélé de vente*. C'en est assez, pour lui donner gain de cause sur sa demande de lods et ventes, mais seulement jusqu'à concurrence de la somme de 11,000 francs.

Il y a lieu d'infirmer les jugements des premières Cours.

Ainsi, bien qu'il soit vrai que, lorsqu'il se présente deux voies différentes de faire une acquisition, il peut y avoir quelquefois des avantages à user de la faculté que la loi donne de préférer celle de ces voies qui peut être ou exempte, ou moins productive de droits seigneuriaux, il peut être, aussi, souvent bien dangereux de le faire. Car, outre le cas de simulation avec fraude, lorsque le fait peut en être prouvé, comme dans la présente espèce, il ne faut pas perdre de vue que, relativement aux divers accidents de la propriété, tels que conquets, propres, ou autres, la nature du titre d'acquisition auquel les parties auront donné la préférence, pourra produire des effets bien différents, selon que ce titre dépendra d'un échange, d'une vente, d'une donation, ou autre contrat. Aujourd'hui, c'est l'Intimé qui souffre de l'exercice de cette faculté ; demain ce pourra être le tour de son co-échangiste, Guertin, qui, voulant faire valoir à son profit le

droit de bailleur de fonds, sera peut-être exposé à se le voir disputer par un tiers qui lui dira : selon votre propre déclaration, vous avez fait un échange "sans aucune soule ou retour."

Le jugement est motivé ainsi qu'il suit :

**La cour, etc.** 1. Considérant, en principe, que si la loi donne à la partie qui a deux voies différentes de faire une acquisition de terre en censive, la faculté de choisir celle de ces deux voies qui peut être, ou exempte, ou moins productive de droits seigneuriaux, sans que le Seigneur puisse, dans ce cas, se plaindre qu'elle soit en fraude à son égard, il faut néanmoins pour cela que la convention qui fait naître son titre d'acquisition, soit une convention sérieuse et sincère, et non simulée, puisque, dans ce dernier cas, le Seigneur est admis à se plaindre de la fraude commise à son préjudice ;

**2.** Considérant, en fait, que l'Appelant, Seigneur de Monnoir, a failli, 1o. dans la preuve du fait, énoncé dans sa déclaration, que l'Intimé avait, vers le 1er Avril, 1852, acquis, à titre de vente, du nommé Augustin Guertin, pour la somme de 13,000 livres ancien cours, la terre désignée dans la dite déclaration comme étant située dans sa censive ; 2o. dans la preuve de la simulation par lui articulée comme ayant eu lieu dans la vente faite par le nommé Joseph Russell à l'Intimé, par acte du 10 Mai, 1852, passé devant Mtre. Clément, et son confrère, notaires, de la terre désignée en la dite déclaration comme étant située dans le Township de Farnham ; laquelle vente, dans l'état de la cause, doit être regardée comme sérieuse et sincère, formant le seul titre qui subsiste entre les parties relativement à l'acquisition que l'Intimé a ainsi faite de la dite terre de Farnham, pour le prix de £350 cours actuel, en à compte duquel le dit acte constate que l'Intimé a payé comptant à son vendeur la somme de £100 même cours, laissant encore due une ba-

lance de £250 dit cours, pour le paiement de laquelle ce dernier a droit d'action personnelle contre lui ;

3. Considérant, quant à l'acte d'échange du 17 Mai, 1852, passé devant Mtre. Lesage et son confrère, notaires, par lequel l'Intimé a donné en échange au dit Augustin Guertin la dite terre de Farnham, et en a reçu, en contre-échange, celle de Monnoir, que l'Appelant a fait preuve de la simulation par lui articulée comme ayant eu lieu dans cet acte en fraude de ses droits, puisqu'il est établi que cet échange, loin d'avoir été fait sans aucune soulte ou retour ainsi qu'énoncé faussement dans le susdit acte, a été réellement fait moyennant une soulte de la part de l'Intimé en faveur du dit Guertin ; laquelle soulte est de 11,000 livres anciens cours, somme égale à celle de £458 6 8 cours actuel, et non pas seulement de £283 3 4 même cours, ainsi qu'énoncé erronément dans le jugement de la dite Cour de Circuit ; que la preuve de cette simulation résulte : 1o. de l'acte d'obligation du 17 Mai, 1852, par lequel l'Intimé, d'un côté, reconnaît devoir à Guertin cette somme de 11,000 livres anciens cours pour valeur reçue, et par lequel même acte, Guertin, de son côté, s'oblige de payer à Russell, "à l'acquit" de l'Intimé, "et à même la somme de 11,000 francs, dit cours, ci-haut mentionnée," la balance du prix de vente que l'Intimé devait encore à Russell ; 2o. des réponses de l'Intimé aux interrogatoires sur faits et articles, et plus particulièrement de ses réponses aux 10<sup>e</sup> et 11<sup>e</sup> des dits interrogatoires, lesquelles comportent clairement un aveu de sa part que son obligation de payer à Guertin la somme de 11,000 francs, est née de l'acquisition qu'il a faite de lui de sa terre de Monnoir par l'acte d'échange du 17 Mai, 1852, et n'a pas eu, par conséquent, d'autre cause que la susdite soulte, d'où il faut nécessairement conclure que c'est cette même soulte qui seule a motivé le "valeur reçue" énoncé dans le dit acte d'obligation ;

4. Considérant, donc, qu'il résulte de la preuve que le titre de l'Intimé à la propriété de la terre de Monnoir, tout en dérivant du dit acte d'échange du 17 Mai, 1852, repose, non sur un simple échange, mais bien sur un échange *mélé de vente*, jusqu'à concurrence de la dite somme de 11,000 livres ancien cours ; qu'il y a eu ouverture au profit de lods et ventes sur cette somme en faveur de l'Appelant, formant les dits lods et ventes £38 3 10 cours actuel ; que, par conséquent, la dite Cour de Circuit, par son jugement du 11 Février, 1854, en condamnant l'Intimé, le dit Benoni Lareau, à ne payer à l'Appelant, le dit honorable Jean Roch Rolland, que la somme de £23 11 11 cours actuel, de lods et ventes, et en déboutant ce dernier de tout le surplus de sa demande, a mal jugé ; que, de même, la dite Cour Supérieure, en confirmant le dit jugement de la dite Cour de Circuit, par son jugement du 29 Avril, 1854, a également mal jugé :

A infirmé et infirme le dit jugement de la dite Cour Supérieure, dont est appel à cette cour ; et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre sur l'appel interjeté en premier lieu devant elle, cette cour infirme le dit jugement de la dite Cour de Circuit, et condamne le dit Benoni Lareau à payer au dit honorable Jean Roch Rolland la dite somme de £38 3 10 cours actuel, montant des lods et ventes sur la dite soulte de £458 6 8 même cours, avec intérêt à compter du 8e jour de Septembre, 1852, jour de l'assignation en cette cause devant la dite Cour de Circuit, et ce, jusqu'au paiement ; et déboute le dit honorable Jean Roch Rolland du surplus de sa demande ; condamne en outre le dit Benoni Lareau aux dépens.

**BETHUNE et DUNKIN**, pour l'Appelant.

**MOREAU, LEBLANC et CASSIDY**, pour l'Intimé.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents : Sir L. H. LA FONTAINE, Bart., Juge-en-Chef,  
AYLWIN, DUVAL et CARON, Juges.

{ RENIERE,.....*Appelant,*  
et  
{ M:LETTTE et al.....*Intimés.*

Jugé :—1. Que les commissaires nommés en vertu de l'Ord : de la 2e Vict. c. 29, et des Statutes sub-séquents sur la même matière, en ce qui concerne la construction d'églises, presbytères &c, forment un tribunal spécial, exerçant dans certaines limites l'autorité judiciaire.

2 Qu'un acte de répartition légalement homologué par ces commissaires fait preuve par lui-même de son contenu, du moins tant que le contraire n'est pas établi.

3 Que le droit d'appel a été reconnu et exercé sur poursuites en recouvrement de la répartition imposée pour subvenir aux frais de construction.

Held :—That the Commissioners appointed under the Ord : 2 Vict. c. 29, and the subsequent Statutes on the same subject, in what respects the building of churches, parsonages, houses, &c., are a special tribunal exercising judicial authority within certain limits.

2. That an *acte de répartition* duly homologated by such Commissioners is, *prima facie* evidence of its contents, at least until the contrary is established and proved.

3. That the right of appeal in suits for the recovery of amounts levied for defraying the expenses of buildings has been allowed and exercised.

Jugement rendu le 12 Mars, 1855.

Les Intimés, Syndics nommés pour surveiller la construction d'un Presbytère, dans la paroisse St. Guillaume d'Upton, poursuivirent l'Appelant en Mars, 1853, devant la Cour de Circuit des Trois-Rivières, pour la somme de 19s. courant sur les allégés suivants :

“ Les Demandeurs réclament du Défendeur, la somme de 19s courant, pour trois paiements, l'un échu le 30 Juin, l'autre le 30 Septembre et le dernier le 30 Décembre dernier, 1852, de la somme de £8 15 10 courant, montant auquel, comme propriétaire d'une terre de trois arpents de front, située dans la dite paroisse de St. Guillaume d'Upton, et comme professant la religion Catholique Romaine, il a été cotisé pour sa contribution à la bâtie du dit Presbytère, et suivant et conformément à l'acte de cotisation fait et dressé par les dits Demandeurs, en leur qualité de syndics comme susdit, en

date du 21 Février, 1852, et duement homologué par jugement ou sentence rendu le 30 Mars, 1852, par les commissaires nommés et constitués dans et pour le dit district des Trois-Rivières, aux fins de l'ordonnance passée par le gouverneur de la ci-devant province du Bas Canada, et le Conseil Spécial, dans la 2e année Vic. ch. 29, et autres Statuts subséquents, les dits Demandeurs ayant été élus syndics pour la construction du dit Presbytère, le 4 Mai, 1851, et leur élection ayant été confirmée par les dits commissaires, suivant la loi, par le jugement ou sentence rendu le 9 Juillet, 1851.

“ Les dits Demandeurs allèguent de plus que les dépenses pour effectuer la construction du dit Presbytère, et pour subvenir aux frais qu'elle occasionnera, ont été estimés à la somme de £579 15 3, et l'estimation approuvée et confirmée par les dits commissaires, et que par le jugement ou sentence ci-dessus mentionné, qui homologue le dit acte de cotisation, il est ordonné que la dite somme ci-dessus dernièrement mentionnée serait payée aux dits syndics par les contribuables nommés au dit acte de cotisation, c'est-à-dire, par les propriétaires de terres et autres immeubles réels situés dans la dite paroisse St. Guillaume d'Upton, au nombre desquels est le Défendeur, aux époques et dans les proportions suivantes, savoir : un douzième à demande, et un douzième à l'expiration de chaque trois mois après la date du dit jugement ou sentence du 30 Mars, 1852, jusqu'au parfait paiement. La cotisation ayant été ainsi faite à raison de trois deniers et demi courant par chaque livre même cours de la valeur des dites terres et autres immeubles réels.”

Une exception à la forme, à raison du défaut de désignation de la propriété du Défendeur, et de mention de l'évaluation de cette propriété, ayant été mise de côté, le Défendeur plaida par une défense au fonds en fait.

Les Intimés avaient également porté des actions de semblable nature contre trois autres individus, qui avaient

opposé les mêmes moyens de défense ; du consentement de toutes les parties les quatre causes furent consolidées par un acte formulé comme suit :

“ Les parties en ces quatre causes par leurs avocats sous-signés, pour éviter des frais, consentent à ce que ces quatre causes soient réunies ensemble pour être jugées conjointement, et pour ne former qu'un seul record en cas d'appel, et admettent :

“ Que les quatre documents filés le 23 Décembre courant, à l'enquête, dans la cause des mêmes Demandeurs contre le sieur Gonnehville, soient considérés filés et produits dans chacune des trois autres causes ci-dessus, à l'enquête, comme les exhibits Nos. 1, 2, 3 et 4 des dits Demandeurs en chaque cause, et que la même preuve faite dans la dite cause, No. 161, soit la preuve faite dans chacune des dites trois autres causes, Nos. 156, 160 et 167, avec cette différence que les Défendeurs tout en admettant, savoir, le dit Euphren Renière qu'il est propriétaire et en possession depuis environ 15 ans, d'une terre de trois arpents de front, le dit Désiré Vincent d'une terre de deux arpents de front, et enfin le dit François Vanasse d'une terre de trois arpents de front, toutes trois situées dans la paroisse de St. Guillaume d'Upton, n'admettent pas par là, ni en aucune façon, l'identité de chacune de ces trois terres avec aucune de celles qui sont mentionnées dans les trois actions qui sont dirigées contre eux.”

Les quatre exhibits en question étaient : 1o. copie de la nomination des syndics ; 2o. le jugement confirmant cette élection ; 3o. copie de la répartition ; 4o. le jugement d'homologation d'icelle.

Les parties entendues au mérite, la Cour de Circuit condamna par un seul et même jugement chacun des Défendeurs à payer le montant demandé.

Ce jugement porté en appel à la Cour Supérieure des Trois-Rivières, y fut confirmé, les deux juges devant qui la cause avait été plaidée étant divisés d'opinion.

L'Appelant se pourvut enfin devant la Cour du Banc de la Reine, et dans son *factum* les raisons qu'il invoque à l'encontre du jugement de la Cour de Circuit sont les suivantes :

“ 1o. Les allégations de la demande étaient absolument insuffisantes et ne pouvaient, en supposant qu'elles fussent toutes prouvées, motiver aucune condamnation contre l'Appelant.

“ 2. Les Intimés n'avaient établi aucun des faits essentiels par eux allégués dans leur action.

“ 3o. Le jugement tel que prononcé était informe, irrégulier et illégal, la cour n'ayant prononcé qu'un seul jugement pour les quatre causes.”

Lors de l'argument l'Appelant prétendit :

Que la répartition n'était pas prouvée, ayant été faite en brevet, sans minute, et la copie produite étant certifiée seulement par le secrétaire des commissaires.

Qu'il n'y avait pas preuve de l'identité de la propriété.

Que la cotisation était informe et irrégulière en autant qu'elle ne contenait pas la contenance de chaque terre, mais seulement l'étendue en front ; que les noms des propriétaires n'étaient pas au long ; que l'évaluation avait été faite par les syndics, tandis que les syndics auraient dû suivre le rôle fait par la municipalité, et enfin que l'Appelant s'appelait Euphren et non Ephren Renière, tel que porté par la répartition.

Que le pouvoir des commissaires était législatif et administratif en quelque sorte, et non judiciaire ; que les commis-

saires étaient des subalternes dont les décisions étaient sujettes à la révision des tribunaux ordinaires. (1)

Et enfin, en réponse à la motion des Intimés pour faire rejeter l'appel, que cet appel était permis, nonobstant le chiffre peu élevé de la condamnation.

Les Intimés contestèrent le droit d'appel au moyen d'une motion pour faire rejeter l'appel sans entrer dans le mérite, et soutinrent le bien jugé. Suivant eux l'action était purement personnelle et n'affectait pas les droits futurs des parties ; que les droits futurs ne pouvaient s'entendre que de droits à perpétuité, et qu'il ne pouvait y avoir appel dans le cas actuel.

Que le jugement homologuant la répartition était une sentence contre laquelle on ne pouvait se pourvoir que par *Certiorari*. Que l'acte de répartition était régulier et suffisant ; que la loi avait établi sur cette matière un mode spécial d'évaluation, et que d'ailleurs il n'y avait aucune preuve de l'existence d'un rôle d'évaluation pour la municipalité.

Que la seule question qui put s'élever sur une répartition homologuée régulièrement était celle de l'identité de la personne, et que l'Appelant pour s'en prévaloir aurait dû se défendre par exceptions, et non par une défense générale.

**SIR L. H. LA FONTAINE, Bart., Juge-en-Chef :** Sous l'Ordonnance du Conseil Spécial de 1839, (2) les pouvoirs qui sont exercés par les commissaires nommés pour l'érection des paroisses, en autant qu'il s'agit de la nomination de syndics et de l'acte de répartition pour la construction d'églises et de presbytères, sont des pouvoirs judiciaires. C'est ce que l'Appelant semble avoir méconnu.

(1) 2 Vic ch. 29 sec. 14 :—13 et 14 Vic. ch. 44, sec. 5 :—14 et 15 Vic. ch. 103 sec. 1 :—Ordl. de 1667, Tit. 9, Art. 3 :—10 et 11 Vic. ch. 7, sec. 33, p. 17 :—1 Bist. Nullités, p. 21 :—2 Ibid. pp. 388, 389 :—6 Carré et Chauveau, art. 1030, p. 827 :—Hention de Penney, Régime Municipal, p. 228, c. 4 :—Rognon, Code Proc. Civ. art. 3, pp. 7 et 8 :—34 Geo. 3, ch. 6, sec. 27.

(2) 8 Vict. c. 29.

La 15e section de l'Ordonnance porte que "les dits commissaires auront toute juridiction, toute autorité et tous pouvoirs à l'effet d'entendre, juger et décider entre les syndics et les intéressés, en rejetant, modifiant ou confirmant le dit acte de cotisation, en tout ou en partie, ainsi qu'ils le trouveront juste et convenable. (1)

Les commissaires (section 18 de l'Ordonnance) nomment un secrétaire, lequel tient " registre de tous les jugements, ordonnances et procédures des dits commissaires, et est le dépositaire légal du dit registre et des dites procédures."

Par deux Actes subséquents (2) amendant l'Ordonnance de 1839, les huissiers de la Cour Supérieure sont déclarés être aussi, en vertu de leur office, les huissiers des dits commissaires.

Ces derniers forment donc un tribunal spécial, régulièrement organisé, et exerçant dans certaines limites l'autorité judiciaire. Les actes qui en émanent sont donc revêtus du même caractère.

Les parties intéressées, c'est-à-dire, les contribuables imposés dans l'acte de cotisation ou répartition, sont régulièrement appelés par l'observation de certaines formalités que la loi prescrit, à comparaître devant les commissaires pour en opposer l'homologation, s'ils jugent à propos de le faire.

La 19e section de l'Ordonnance porte que " lorsque l'acte de cotisation aura été homologué par les dits commissaires, les syndics auront droit d'exiger des contribuables le paiement des cotisations ou contributions, et en cas de refus de paiement, le recouvrement pourra en être poursuivi devant une cour civile du district, de juridiction compétente, suivant le montant de l'action en question."

(1) 13 et 14 Vict. chap. 44, sec. 3.

(2) 13 et 14 Vict. chap. 44, sec. 11 :—16 Vict. sec. 5.

Du moment que l'acte de cotisation est ainsi homologué, il acquiert le même caractère d'authenticité que tout autre acte d'une nature semblable, reconnu solemnellement par une cour de justice. Il fait pour le moins, *primâ facie*, preuve de son contenu, à ce point de vue, l'acte de cotisation dont il s'agit, est sensé prouver par lui-même, entre autres choses, 1o. que Renière, l'Appelant, est au nombre des contribuables imposés, y étant mentionné comme tel ; 2o. qu'il était lors de l'acte de cotisation, propriétaire de la terre indiquée dans cet acte, à raison de laquelle il a été ainsi imposé, y étant également mentionné comme tel ; 3o. que cette terre était de la valeur portée au dit acte, et que sa quote part de contribution, à raison de cette valeur, est celle dont le chiffre est énoncé dans le même acte ; 4o. que les trois premiers termes de paiement de cette contribution étaient échus lors de l'introduction de la poursuite contre lui en la Cour de Circuit.

Dans l'état de la cause, il me semble que les Demandeurs avaient là, dans une forme authentique, toute la preuve qu'il leur fallait faire pour établir leur demande et obtenir une condamnation personnelle contre le Défendeur ; que, par conséquent, ils n'avaient pas besoin de prouver, par témoins, ou par une admission du Défendeur, soit l'identité, soit la valeur, ou même la possession de la terre mentionnée dans leur déclaration. C'était au Défendeur, s'il pouvait le faire, à offrir la preuve légale du contraire. Ainsi la réserve faite par le Défendeur, à la fin de l'admission des parties, en date du 30 Décembre, 1853, à l'effet que tout en déclarant être propriétaire et en possession d'une terre de trois arpents de front, dans la paroisse St. Guillaume d'Upton, il n'admettait pas par là, ni en aucune façon, l'identité de cette terre avec celle mentionnée dans l'action, ne peut nullement lui servir, ni militer contre les Demandeurs.

Pour ces raisons, je suis d'opinion que l'appel doit être débouté, et le jugement de la Cour de Circuit confirmé.

Quant au droit d'appel en lui-même, droit dont les Intimés ont nié l'existence dans des causes de cette nature, il suffit de remarquer que ce droit a été souvent reconnu, entre autres, en 1819, dans une cause de Cherrier et al., syndics de Vaudreuil, contre St. Julien, et en 1824, dans celle de Dupuis et al., syndics de Blairfindie, contre Roy.

Le jugement est dans les termes suivants :

La Cour : 1o. Considérant que sur l'appel interjeté devant la Cour Supérieure, siégeant dans le District des Trois-Rivières, du jugement de la Cour de Circuit du 31 Décembre, 1853, la dite Cour ayant été partagée d'avis sur la question de savoir si le dit jugement devait être, ou non, confirmé, le dit jugement a été et est demeuré en conséquence, au désir de la loi, confirmé par le jugement de la Cour Supérieure du 2 Juin, 1854 ; 2o. Considérant que dans le dit jugement de la dite Cour de Circuit, en autant qu'il concerne le dit Renière, l'Appelant devant cette Cour, il n'y a pas erreur ; confirme le dit jugement avec dépens.

PICHÉ, pour l'Appelant.

CHERRIER, DORION et DORION, pour les Intimés.

### SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

|                                                                                                     |                                                       |
|-----------------------------------------------------------------------------------------------------|-------------------------------------------------------|
| $\left\{ \begin{array}{l} \text{JOSEPH, .....} \\ \text{CUVILLIER, et al.....} \end{array} \right.$ | <i>Plaintiff.</i><br><i>vs.</i><br><i>Defendants.</i> |
|-----------------------------------------------------------------------------------------------------|-------------------------------------------------------|

Held:—That Bail to the Sheriff, for a Defendant arrested on a *Capias ad Respondendum*, are only liable for the amount stated in the bailbond, and not for the full amount of the judgment rendered against such Defendant.

Jugé:—Que les Cautions au Shérif, pour un Défendeur arrêté sur un *Capias ad Respondendum*, ne sont responsables que pour le montant mentionné dans le cautionnement, et non pour le montant en entier du jugement rendu contre tel Défendeur.

Judgment rendered the 28th February, 1855.

The Defendants in this cause became Bail to the Sheriff by bond for £400, dated 11th June, 1846, before the return

of the writ, in an action brought by the Plaintiff against one Joseph A. Bulmer, arrested on a *Capias ad Respondendum*. The affidavit on which the Capias issued, alleged Bulmer to be indebted in £200 sterling, for damage done to certain boxes of glass by Bulmer's negligence on board his vessel, conclusion for £800.

On the 16th January, 1847, judgment was rendered against Bulmer for £273 10 3 with interest, from the 11th June, 1846, day of service of process. A *désistement* was filed by the Plaintiff for interest previous to the date of judgment; and on appeal by Bulmer the judgment below was affirmed. The Plaintiff in his action against the Bail, made the usual allegations in actions on Bail Bonds, assigned to the Sheriff, and concluded for £400 with interest and costs. Pleas were filed by the Defendants which were not alluded to in rendering the final judgment.

**DAY, Justice :** The Plaintiff contends that the Bail are liable for the full amount of the judgment rendered against the original Defendant whatever that may amount to. This is utterly untenable. The liability of the Bail arises from a Judicial Contract, and cannot be extended. It is said that the English practice in similar cases, is favorable to the Plaintiff. The Court has not thought it necessary to look into that, such pretension cannot be sustained here, for otherwise a man might be arrested on an affidavit charging him with a debt of £10, and after Bail was given as in an action for that sum, Judgment might be rendered for a £1000, and the Bail held liable for that sum, a doctrine that this Court will not sanction.

Judgment condemning the Defendants "to pay to the " Plaintiffs the sum of £216 5 6, being the only amount " for the payment of which the Defendants became jointly

" and severally liable, and bound themselves under and by  
" virtue of a certain Bail Bond, &c." with interest, &c.

Cross, for Plaintiff.

**Rose and Monk, for Defendants.**

## **SUPERIOR COURT.—MONTREAL.**

**Before DAY, SMITH and VANFELSON, Justices.**

Held:—That a lessee of land cannot set up, as against his lessor, Plaintiff in a petitory action, ameliorations made by the lessee on the land sought to be recovered.

Jugé :—Que le locataire d'une terre ne peut, à l'encontre d'une action pétitionnée portée contre lui par le locateur, plaider qu'il a fait des améliorations sur la terre réclamée par le Demandeur.

Judgment rendered the 27th March, 1855.

Petitory action. The second plea set forth a verbal lease of the land from the Plaintiff for four years, and ameliorations made on the land by the Defendant to the amount of £25. Conclusions to be paid ameliorations before being compelled to quit the lot. Demurrer to second plea. Judgment dismissing plea because "by law the Defendant is not entitled "to the conclusions therein taken, while he held the land as "tenant and *locataire* of the Plaintiff."

DURANCEAU, for Plaintiff.

**MOREAU, LEBLANC and CASSIDY, for Defendants.**

**SUPERIOR COURT.—MONTREAL.**

**Before DAY, VANFELSON and MONDELET, Justices.**

Held :—That in an action by the heirs of a wife *commune en biens*, against their father, praying to be declared proprietors of one half of a farm belonging to the *communaué*, it is necessary to specify which half, if a partition has taken place, and if not, to pray for such partition by the declaration.

Jugé :—Que dans une action par les héritiers d'une femme commune en biens, contre leur père, concluant à ce qu'ils soient déclarés propriétaires de la moitié d'une terre, il est nécessaire d'indiquer quelle moitié est réclamée, s'il y a eu partage, sinon, de conclure à tel partage par la déclaration.

Judgment rendered the 27th September, 1854.

Action by Plaintiffs, as heirs of their mother, against the Defendant, their father, setting up the acquisition during the *communauté* of a lot of land of three arpents in front by twenty arpents in depth, and their title as heirs. Conclusion : “ à ce “ que le Défendeur soit assigné, etc., pour voir dire et dé- “ clarer les Demandeurs les seuls, vrais et légitimes propri- “ étaires de la moitié de la dite terre, désignée, etc., con- “ cluant en outre les Demandeurs, à ce que le Defendeur soit “ condamné à abandonner la jouissance de la susdite moitié “ de la dite terre,” etc., *défense en droit* for reasons referred to in the judgment, which is *motivé*, as follows :

" Considering that it doth not appear by the allegations of  
" the Plaintiffs' declaration, that any partition, *partage*, hath  
" ever been obtained of the lot of land therein described, and  
" that nevertheless the Plaintiffs have not alleged that the  
" said land is held by them and the Defendants *par indivis*,  
" and have not prayed for a partition thereof; and further  
" considering that the Plaintiffs have not in the allegations of  
" their declaration, or in the conclusions thereof, specified or  
" in any manner described the half of the said lot of land

" which they thereby seek to recover, and that by reason  
 " thereof, and by law, no judgment can be thereupon render-  
 " ed ; maintaining the *defense en droit*, doth dismiss the  
 " Plaintiffs' action with costs."

**MORIN**, for Plaintiffs.

**PELLETIER, PAPIN and BELANGER**, for Defendant.

### SUPERIOR COURT.—MONTREAL.

Before **DAY, SMITH and VANFELSON**, Justices.

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| No. 524. | <b>DOUTRE</b> ,..... <i>Plaintiff.</i><br>vs.<br><b>THE MONTREAL AND BYTOWN<br/>RAILWAY COMPANY</b> ,..... <i>Defendants.</i> |
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Held :—That an *Exception à la forme* in which it is alleged that the contents of a paper writing, purporting to be a copy of a declaration, are different from the contents of the original declaration, and are disconnected, absurd and unintelligible, is sufficient.

Jugé :—Qu'une Exception à la forme dans laquelle il est allégué que le contenu d'un écrit, dit être copié d'une déclaration, est différent du contenu de la déclaration originale, n'est pas connexe, est absurde et inintelligible, est suffisante.

Judgment rendered the 30th November, 1854.

Plea in the nature of a demurrer to an *Exception à la forme* filed by Defendant. The exception alleged that " the contents of the paper writing served on the Defendant are wholly different from the contents of the said declaration, and are disconnected, absurd and unintelligible ;" exception held sufficient, if proved. Demurrer dismissed.

**COFFIN**, for Plaintiff.

**BADGLEY and ABBOTT**, for Defendant.

## SUPERIOR COURT.—IN VACATION.

Before BADGLEY, Justice.

No. 1972.—*Ex parte—LOUIS LAVOIE, Petitioner.*

Held.—1. That by the Statutes 12 Vic., c. 27, and 14 and 15 Vic., c. 1, Returning Officers, and their Deputies, have been and are subject to punishment by the House of Assembly for malversation; that malversation on their part is a special breach of privilege of the House, as an attempt to put in or keep out a member unjustly; and that the general power accorded in cases, not specially provided for in the Statutes, must almost always relate to the Returning Officer, or his Deputy, or to some person, not a member, in respect of whom the House is authorized to make such orders, as to the House may seem proper, necessarily implying a power in the House to enforce such order.

Jugé: 1. Que par les Statuts 12 Vict., c. 27, et 14 et 15 Vict., cap. 1, les Officiers Rapporteurs, et leurs Députés, ont été et sont sujets à être punis par la Chambre d'Assemblée pour malversation; que la malversation de leur part est une violation spéciale des priviléges de la Chambre, comme tentative d'introduire injustement un membre ou de l'en faire rejeter; et que le pouvoir général accordé dans ces cas, pour lesquels il n'y a aucune provision spéciale par un Statut, doit presque toujours avoir rapport à l'Officier Rapporteur, ou à son Député, ou à quelqu'un qui n'est pas membre, relativement à qui la Chambre est autorisée à faire tels ordres qu'elle jugera à propos, et que ce pouvoir donne nécessairement à la Chambre le pouvoir de mettre tels ordres à exécution.

2. That the House of Assembly has the power, as a power necessary for its existence, and the proper exercise of its functions, of determining judicially, all matters touching the election of its own members, including therein the performance of the duty of those officers, who are entrusted with the regulation of the election of its members.

2. Que la Chambre d'Assemblée possède, comme étant nécessaire à son existence, et à l'exercice de ses fonctions, le pouvoir de déterminer judiciairement, toute matière touchant à l'élection de ses propres membres, y compris la manière dont les officiers qui sont chargés de la conduite des élections de ces membres, remplissent leurs devoirs.

3. That Courts of law cannot inquire into the cause of commitment by either House of Parliament, nor discharge, nor bail a person, who is in execution by the judgment of any other tribunal; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust and contrary to every principle of positive law or national justice, the Court will not only be competent, but bound to discharge the party.

3. Que les Cours de justice ne peuvent s'enquérir de la cause de détention par l'une ou l'autre Chambre, ni décharger, ni admettre à caution une partie qui subit la sentence d'aucun autre tribunal; néanmoins si le mandat ne constate pas que l'offense ait été un mépris, (*contempt*) mais au contraire est évidemment arbitraire, injuste et opposé à tout principe de droit établi ou de justice, non seulement la Cour serait compétente, mais il serait de son devoir de décharger la partie.

4. That a commitment, by either House of Parliament, may be examined upon a return to a writ of Habeas Corpus.

4. Qu'un mandat d'arrêt, par l'une ou l'autre Chambre, peut être examiné sur un retour à un Writ d'Habeas Corpus.

5. That the Justices, here as well as in England, possess, and have exercised the power to issue writs of Habeas Corpus in matters of commitment by either House of Parliament.

5. Que les Juges dans ce pays comme en Angleterre, possèdent, et ont exercé le pouvoir d'émaner des writs d'Habeas Corpus en matière de détention par l'une ou l'autre Chambre du Parlement.

6. That the Provincial Statutes 12 Vict. cap. 27, and 14<sup>th</sup> and 15 Vict. cap. 1, invest the House of Assembly with power to punish, by imprisonment, a Deputy Returning Officer for malfeasance or breach of privilege.

6. Que les Statuts Provinciaux 12 Vic., c 27, et 14 et 15 Vic cap. 1, donnent pouvoir à la Chambre d'Assemblée, de punir, par emprisonnement, un Député Officier Rapporteur pour malversation comme violation du privilége.

Judgment rendered the 16th March, 1855.

The application made was upon a return, by the keeper of the Common Gaol of the district of Quebec, for a writ of *Habeas Corpus*, issued upon the affidavit and petition of Louis Lavoie, commanding the said keeper to produce the body of the said Louis Lavoie, together with the day and cause of his detention ; the return set forth :—

“ That the body of Louis Lavoie, was committed into the Common Gaol of the district of Quebec, by virtue of a warrant from under the hand and seal of the Honorable L. V. Sicotte, Speaker of the Legislative Assembly of the Province of Canada ; copy of which warrant is hereunto annexed.”

Province of  
Canada. {

*To the keeper of the Common Gaol of the District of Quebec.*

“ Whereas the Legislative Assembly of this Province did this day resolve, that Louis Lavoie, Deputy Returning Officer for the parish of Les Eboulements, at the late election for the County of Saguenay, has been guilty of a gross breach of the privilege of the said Legislative Assembly, and did therefore order that the said Louis Lavoie be, for the said offence, committed to the Common Gaol of the District of Quebec, for the term of ten days :

“ These are therefore to require you to receive the said Louis Lavoie into your custody, and him safely keep in the

said Common Gaol for and during the term of ten days commencing from the date of these presents.

“ And herein fail not.

“ Witness my hand and seal at Quebec, the ninth day of March, in the year of Our Lord one thousand eight hundred and fifty-five, and of Her Majesty's reign the eighteenth.

Signed,

L. V. SICOTTE,

Speaker of the Legislative Assembly of the Province of Canada.

A true copy.

(Signed) J. MACLAREN, Gaoler.

The circumstances which gave rise to the present case are these :—

A select Committee of the House of Assembly appointed to try the merits of the controverted election for the County of Saguenay, which took place on the 25th and 26th days of July, 1854, reported to the House on the 17th day of November, 1854, “ That in the opinion of the Committee, a large proportion of the names inscribed in the Poll Books for the parish of Les Eboulements were fictitious names, illegally and fraudulently inscribed thereon as legal votes at the said election : and that Louis Lavoie, Deputy Returning Officer for the said parish of Les Eboulements, was privy to the said fraud and illegal proceedings.

“ That in the opinion of the Committee, a gross breach of the privilege of the Honorable the Legislative Assembly of the Province has been committed by the said Louis Lavoie ; and this Committee recommend that the said Louis Lavoie be taken into the custody of the Sergeant at Arms, and be

" further punished in such manner as the Legislative Assembly may deem proper.

" That the last election for the said County of Saguenay is illegal and void."

This report was adopted by the House of Assembly, and a Writ issued for another election for the County of Saguenay, which said election took place on the 12th and 13th days of January, 1855.

By a resolution of the House, passed on the 20th day of November, 1854, it was ordered, " That Louis Lavoie do appear at the bar of this House on Thursday, the 1st day of March next, to answer for his conduct as said Deputy Returning Officer at the last Election for the said County of Saguenay."

On the 6th day of March, 1855, the House passed the following resolutions :

" On motion of the Hon. Sir Allan N. MacNab, seconded by Mr. Drummond " :—

" Resolved.—That Louis Lavoie, Deputy Returning Officer for the parish of Les Ebolements, at the late election for the County of Saguenay, was privy to the fraudulent and illegal inserting of names in the Poll Book for the said parish, and that he has thereby been guilty of a misdemeanour and a gross breach of the privileges of this House."

" On motion of the Hon. Sir Allan N. MacNab, seconded by the Hon. Mr. Attorney General Drummond " :—

" Ordered.—That the said Louis Lavoie be, for the said offence, committed to the common gaol of the District of Quebec for the term of ten days, and that Mr. Speaker do issue his warrant accordingly."

"I hereby certify the above to be true extracts from the Journals of the Honorable the Legislative Assembly."

(Signed,)                  W. B. LINDSAY,  
*Clerk Assembly.*"

Quebec, 10th March, 1855.

Upon these resolutions, the Speaker's warrant above recited, issued :—

Notice of the application for the writ of *Habeas Corpus*, and of the appointed time for the hearing upon the return thereto, having been duly signified to the Speaker of the Legislative Assembly, the Honorable L. V. Sieotte, and to the Honorable Attorney General Drummond, and no opposing party appearing, Mr. P. B. Casgrain proceeded to state the case for the petitioner. He began by reading the affidavit and petition of the prisoner upon which the writ of *Habeas Corpus* was granted ; they are as follows :

Province of Canada,      }  
 District of Quebec. }

*Louis Lavoie, Esq., Notary, of the Parish of Les Eboulements, in the district of Quebec, being duly sworn upon the Holy Evangelists, doth depose and say :*

That he is a subject of Her Majesty, and that he is detained in the common gaol of the District of Quebec, under the warrant of the Speaker of the Legislative Assembly of this Province.

That his detention is illegal ; and that especially the said Louis Lavoie was not Deputy Returning Officer of the Parish of Les Eboulements at the last election for the County of Saguenay.

That the said Louis Lavoie is not detained for any crime, but for a breach of the privileges of the Legislative Assembly of Canada.

And further, the said Louis Lavoie saith not, and, after reading the foregoing deposition, hath signed.

(Signed,) \_\_\_\_\_

L. LAVOIE.

Sworn at Quebec, this 12th day of  
March, 1855, before me the un-  
signed.

**Province of Canada,** }      **IN VACATION.**  
**District of Quebec.** }

To the Honorable the Chief Justice and Honorable Justices of the Queen's Bench for Lower Canada ; and to the Honorable the Chief Justice and Honorable Justices of the Superior Court for Lower Canada.

*"Louis Lavoie, Esquire, Notary, of the parish of Les Eboulements, in the District of Quebec, by his present Petition—*

## HUMBLY SHEWETH :

" That the said Louis Lavoie is detained in the common gaol of the District of Quebec, in virtue of a warrant from the Speaker of the Legislative Assembly of the Province of Canada.

**“That his detention is illegal.**

"That the Judges of the Superior Court have the right of inquiring into the cause of his detention.

"That the Legislative Assembly of Canada has not the power to punish by imprisonment for a breach of privilege committed outside the House.

" That the said Legislative Assembly is not a Court of Judicature, having jurisdiction to judge and condemn the said Louis Lavoie upon the offence alleged in the above mentioned warrant.

“ That the offence alleged is punishable by the law of the country.

“ That supposing that the said Legislative Assembly has the power that it has exercised, it cannot exercise it according to the manner of the House of Commons, by a warrant in the form and according to the usage and custom of Parliament.

“ That it does not appear by the said warrant that the said Louis Lavoie was heard upon his defence, or that he was notified or present when the said warrant issued.

“ That the said warrant does not order the arrest of the said Louis Lavoie, but merely his reception and detention in the common gaol of the District of Quebec, and is not addressed to any person for execution.

“ That the said warrant is null and illegal, and cannot be the cause of the detention of one of Her Majesty's subjects, and the said Louis Lavoie is a loyal subject of Her Majesty.

“ Wherefore, the said Louis Lavoie prays that your Honours, if there is probable and reasonable cause for the present complaint, do grant, in vacation, a writ of *Habeas corpus ad subjiciendum*, under the seal of the Court of which whoever of your Honors may render justice on the present complaint, may be a member, addressed to the keeper of the Common Gaol of the District of Quebec, and returnable, *immediate*, before whoever of you who shall so have granted it, or before any other judge of the Court under the seal of which the said writ shall have issued.

“ And as in duty bound your Petitioner will ever pray.

“ L. Lavoie.

“ Witnesses :

“ (Signed.)

“ P. B. CASGRAIN,

“ ED. TREMBLAY.

“ Quebec, 12th March, 1855.”

**CASGRAIN, P. B., for Petitioner :** The question in this case is whether the House of Assembly of this Province has the right of committing generally, or only for interruptions committed within the body of the House, and which interrupt its proceedings.

I maintain that there is an essential difference between the warrant of the Speaker of the House of Commons in England, and that of the Speaker of the Legislative Assembly of this Province. The Legislative Assembly of this Province was created by an Act of the Imperial Parliament, 3 & 4 Vict., chap. 35, and unless by this Act the power which the Legislative Assembly has exercised on the present occasion is expressly given to it, it does not possess it at all. The 3rd section of this Act creates the constitution and power of the Parliament of this Province, in these words : " And be it enacted, that from and after the reunion of the two said Provinces of Upper and Lower Canada, there shall be in the Province of Canada one Legislative Council and one Assembly, which shall be called "The Legislative Council and Assembly of Canada;" and Her Majesty shall have the power to make, in the said Province of Canada, by and with the consent of the said Legislative Council and Assembly, laws for the peace, welfare, and good government of the Province of Canada, which shall not be contrary to the present Act, or to any Act of Parliament in force, or that may be passed having reference to the Province of Canada."

It is evident that by this clause no such power was communicated to it ; and to show that it cannot arrogate to itself the possession of any such dangerous power, and consequently that it does not possess it, I will refer to the remarks of Baron Parke in the case of Kielley vs. Carson and others, (1) in which case Kielley, the Appellant, was committed to gaol under the warrant of the Respondent, Carson, the Speaker of

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(1) 4 Moore's Privy Council Reports, p. 63.

the House of Assembly of Newfoundland, for an alleged breach of privilege, in having, as complained of by Mr. Kent, one of the members of the House of Assembly, reproached him, Kent, in gross and threatening language, for observations he had made in his place in Parliament respecting the Hospital in St. John's town, the capital of Newfoundland, of which Kielley was the district Surgeon and Manager ; and upon being brought up, under a writ of Habeas Corpus, before one of the Judges of the Superior Court of Newfoundland, was discharged. In consequence of which commitment and imprisonment Kielley brought an action of trespass and false imprisonment in the Superior Court of Newfoundland against Carson, the Speaker, Walsh, the Messenger, and Kent and others, members of the House of Assembly, who pleaded, first—the general issue ; and secondly, special justification, setting forth the resolutions of the House of Assembly in obedience to which they averred they had acted ; and upon Kielley's demurrers to these pleas, the Court directed judgment to be entered up for the Defendants. From this judgment Kielley appealed to the Privy Council, where the judgment of the Supreme Court was reversed ; Baron Parkes in rendering the judgment of the Privy Council, remarking :—

“ The 11th January, 1843.

“ The great importance of the principal question in this case induced those of their Lordships who heard the first argument to request that a second might take place before themselves, and other members of the Judicial Committee. The case has been again argued before the Lord Chancellor, the Lords Brougham, Denman, Abinger, Cottenham and Campbell, the Vice Chancellor of England, the Lord Chief Justice of the Common pleas, Mr. Justice Erskine, the Right Hon. Dr. Lushington and myself ; and I have been instructed by their Lordships to state the reasons for the advice which they will give to Her Majesty to reverse the judgment of the Court below.

" That judgment was given in favor of the Defendants, upon a demurrer to several special pleas to an action of trespass for false imprisonment, by which the acts complained of were justified by the Defendant, Carson, as Speaker of the House of Assembly of Newfoundland, by other Defendants as members of that House, and by one as Messenger in aid of the Sergeant-at-Arms, upon an arrest and commitment for an alleged breach of privilege of the House.

" Several objections were taken of a formal nature to these pleas, which it is unnecessary to state, as the opinion of their Lordships is not founded upon any of these objections. The main question raised by the pleadings, and applying equally to the case of all the Defendants, was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege. It is indeed stated in the plea of the Defendant, Carson, and that of the other Defendants, members of the House, that something occurred which might amount to a contempt, committed in the face of the Assembly, by the use of violent and threatening words to one of the members then present in his place ; but each plea also justified the original arrest of the Plaintiff below, upon a warrant issued by the Speaker, founded on the complaint of a breach of privilege committed out of the House ; and if the Assembly had not the power to issue that warrant, this part of such plea is bad ; and as such plea is entire, the whole is bad. The question , therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise in this case.

" Their Lordships are of opinion that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors, and consequently that the judgment of the Court below must be reversed.

" In order to determine this question, and to ascertain what the legal powers of the Assembly were, it is proper to consider first, under what circumstances it was constituted, and what was the legal origin of its power.

" Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament); and on the other hand, the Crown possesses the same prerogative and the same powers of Government that it does over its other subjects; nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign has not merely the right of appointing such magistrates and establishing such corporations and Courts of Justice as he may do by the Common Law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the Colony, for the government of its inhabitants. This latter power was exercised by the Crown in favor of the inhabitants of Newfoundland in the year 1832, by a commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department; and the whole question resolves itself into this: whether this power of adjudication upon, and committing for a contempt, was by virtue of the commission and the instructions, legally given to the new Legislative

Assembly of Newfoundland ; for under these alone can it have any existence, there being no usage or custom to support the existence of any such power whatever.

"In order to determine that question, we must first consider whether the Crown did in this case invest the local Legislature with such a privilege. If it did, a further question would arise—whether it had a power to do so by law.

" If that power was incident as an essential attribute to a Legislative Assembly or a dependency of the British Crown, the concession on both sides that the Crown had a right to establish such an Assembly puts an end to the case. But if it is not a legal incident, then it was not conferred on the Colonial Assembly, unless the Crown had authority to give such a power, and actually did give it.

" Their Lordships give no opinion upon the important question, whether, in a settled country such as Newfoundland, the Crown could by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority, not incidental to it, of committing for a contempt—an authority materially interfering with the liberty of the subject, and much liable to abuse. They do not enter upon that question, because they are of opinion, upon the construction of the commission and of its accompanying documents, that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland ; and if it did not pass as an incident, by the creation of such a body, it was not granted at all. This appears to be clear from the consideration of the instrument.

" By the commission for establishing the Legislative Assembly, dated the 26th July, 1892, His late Majesty, King William the Fourth, authorized the Governor, with the advice and consent of the Council of the Island, from time to time to summons and call general assemblies of the freeholders

and householders within the Island, in such manner and form, and according to such powers, instructions and authorities as were granted or appointed by the general instructions accompanying the commission, or according to such further powers, instructions or authorities as should at any time thereafter be granted or appointed under His Majesty's sign Manual and signet, or Order in Council ; and that the persons thereupon duly elected should take the oaths, and should be called and declared the General Assembly of the Island of Newfoundland ; and the Governor, with the advice and consent of the Council and Assembly, or the major part of them respectively, should have full power to make, constitute or ordain laws, statutes and ordinances for the public peace, welfare and good government of the Island and its dependencies, and the people and inhabitants thereof, and such other as should resort thereto, which laws, &c., were to be as near as might be to the laws and statutes of the United Kingdom, and subject to the approbation of His Majesty, and to the negative voice of the Governor.

" Accompanying this commission was a dispatch from Viscount Goderich (now Earl of Ripon), containing instructions (1) to the Governor for the regulation of his conduct, upon which some reliance was placed on the argument at the bar, as affording evidence of the intention of the Crown to confer the power in question upon the House of Assembly. The commission itself, where such an authority would naturally be expected to be found if the Crown had intended to confer it, is entirely silent upon this subject, nor does it grant any of the privileges of the British Parliament ; and the terms used by the Earl of Ripon's letter have, probably, reference to the mode of conducting business and the forms of procedure, which are to be assimilated to those of the British House of Commons ; at all events, terms so vague and gene-

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(1) See Clark's Colonial Law, 435.

ral could never have been used with the intention of giving the powers of commitment, and other privileges of so important a nature, if the authority of the Crown was required to bestow them by a special grant.

“ The whole question then is reduced to this : whether by law the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature.

“ The Statute Law on this subject being silent, the common law is to govern it ; and what is the Common Law depends upon principle and precedent.

“ Their Lordships see no reason to think that in the principle of the Common Law any other powers are given them than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. ‘ *Quando Lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*’ In conformity to this principle we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this

extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

"These powers certainly do not exist in corporate or other bodies, assembled with authority to make by-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects ; but still there is no reason why it should possess the power in question.

"It is said, however, that this power belongs to the House of Commons in England : and this, it is contended, affords an authority for holding that it belongs, as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription ; the *lex et consuetudo Parlamenti*, which forms a part of the Common Law of the land, and according to which High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishment for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly—a claim for which there is not any color of foundation.

"Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever ; and it is to be remarked that all those bodies which possess the power of

adjudication, and punishing in a summary manner contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

" Their lordships, therefore, are of opinion that the principle of the Common Law, that things necessary pass as incident, does not give the power contended for by the Respondents as an incident to, and included in, the grant of a subordinate Legislature.

" It was, however, argued that in other colonies the Legislative Assemblies exercise the power of committing for breach of privilege without objection, and that the usage in this respect was good evidence that such power was an incident attached by the Common Law, though not on the ground of necessity. And no doubt this argument would have had much weight if there had been many Legislatures situate precisely as this is, and the usage to exercise the power of committal for breach of privilege had been frequent, and the acquiescence in its exercise long and universal, and usage could have been explained only on the ground that the power was a legal incident. But no such usage has been proved, and the constitution and practice of different colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another. In some the very exercise of the power, with the sanction of the tribunals and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law. But in this case we have the simple question to decide, without any usage, any acquiescence, or any sanction of the Courts of Law, except in the very case in which we are now called upon to

affirm or reverse the judgment of the Court below. It remains to be considered how the question stands on express authority, and unless there be that satisfactory authority expressly in favor of the power, we must hold that the Common Law does not confer it.

" There is no decision of a Court of Justice, nor other authority, in favor of the right, except that of the case of Beaumont vs. Barrett, (1) decided by the Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their lordships, delivered by myself immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial ; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in Burdett vs. Abbott, (2) which *dictum* we all think cannot be taken as an authority for the abstract proposition, that every Legislative body has the power of committing for contempt. The observation was made by his lordship with reference to the peculiar powers of parliament, and ought not, we all think, to be extended any further.

" We all, therefore, think, that the opinion expressed by myself in the case of Beaumont vs. Barrett ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the Common Law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the proper exercise of

(1) 1 Moore's P. C. C. 59.

(2) 14 East, p. 136.

their functions and duties, but they have not what they erroneously supposed themselves to possess—the same exclusive privileges which the ancient law of England has annexed to the House of Parliament."

It is evident, therefore, that the Legislative Assembly does not possess this power by virtue of the usage and custom of Parliament ; as, to establish this, it would be necessary, as Baron Parke remarks in the judgment above recited, to shew that "the usage had been frequent, and the acquiescence in its exercise long and universal :" and in the case of Cuvillier et al. vs. Munro, (1) where the question of the privileges of the Legislative Assembly of the Province, is elaborately discussed. Day, Justice, observes : "There can be no question that under our system, as well as in England, usages may sometimes acquire the authority of written law. The rule of the civil law was, *Sine scripto jus venit quod usus approbavit. Nam diurni mores consensu utentium probati legem imitantur.* (2) But usage, to become law, must be accompanied by certain conditions which are substantially the same in all countries in which the doctrine prevails. Thus the usage must be uniform, public, constant, universal among those whom it concerns, and continued for a long period of time. (3) In England the period of time is technically expressed as that beyond which the memory of man reaches not, and this memory is supposed to extend back to the time of one of the earliest kings of the conquest. In the countries governed by the civil law, it is the duty of the Courts to decide, whether a usage has been attended with the necessary conditions, and has existed sufficiently long to acquire the authority of law ; whether, in fact, it has become a jurisprudence.

(1) 4 L. C. Reports, p. 148.

(2) Inst. de Jure Nat. §. 39.

(3) 1 Toullier, No. 150.

Neither can it be maintained that the Assembly possesses the power, in consequence of its analogy with the Parliament of Great Britain, as the claim of the Imperial Parliament is founded upon the law and custom of Parliament (1) and there is no law or custom of Parliament in existence here, as I have shewn, upon which to found a claim to such a right ; nor can it be pretended that it passed to it as a legal incident ; this was clearly established by Baron Parke in the judgment mentioned above ; the same principle was stated by Mr. Justice Haliburton (2) ; and on this point, DAY, Justice, in the same case of Cuvillier *et al.* vs. Munro, says : " It is difficult to imagine that a question of greater importance, or of deeper interest, could arise in a Colonial Court of Justice, than one thus involving the proposition that all the undefined powers of the House of Commons in England are vested in our Provincial Assembly. If it be so, they entirely overshadow the powers of this Court, and the parties concerned in the issuing and executing of the writ in this case, have been guilty of a high contempt and breach of privilege, and are liable to be called to account for it. The question, however, important and interesting as it is, does not now arise for the first time. It has been of late years repeatedly discussed in the Colonial Courts, and before the Privy Council. It is therefore to be decided rather upon authority than from a reasoning upon general principles." His Honor then refers to the cases of Beaumont vs. Barrett, and Kielley vs. Carson and others, and says that Baron Parke, in rendering the judgment in the latter case, as reported above, declares the opinion expressed in the former, that the principle of committing for contempt was incidental to every legislative body, extra judicial ; " it is in fact," says Mr. Justice DAY, " entirely subverted by the judgment in Kielley vs. Carson and others, by the same judges who concurred in the judg-

(1) Coke's 4th Institutes, p. 15 :—3 Hawkins, P. C., Book 2, cap. 15, s. 73 :—  
1 Blackstone, Com. 164

(2) 2 Haliburton's Nova Scotia, p. 324.

ment of Beaumont vs. Barrett ; the Imperial Act (1) constituting the Legislature of Jamaica recognizes the existence of the Laws of England in the Island ; and enacts, " that all such laws and statutes of England as have been at any time esteemed, introduced and accepted, or received, as laws in that island, should and were thereby to be, and continue to be the laws of Jamaica for ever ;" therefore, this judgment, instead of being opposed to my pretension, is entirely confirmatory of it, and perfectly establishes the principle for which I contend that no Legislative Assembly possesses the power exercised by the House of Assembly in this case, unless it is specially conferred upon it by the Act of Parliament creating it.

But supposing, although I maintain I have clearly established that such is not the case, that this power has been granted to the Legislative Assembly by the Act of its constitution, I contend that the Imperial Parliament has not the power to delegate it ; it has been contended in the argument at the bar, in the case of Kielley vs. Carson *et al.* (2) that the Crown cannot delegate such a power, I go further and I say, that the Parliament cannot delegate it.

Admitting that the Imperial Parliament has the right to delegate this power to a subordinate Legislature, it would not do so, as it would thereby make the offspring co-ordinate with the parent, and render more than probable the collision of the two. As if, for instance, the House of Commons were at this moment, under virtue of the Speaker's warrant, to summon the prisoner in this case, Louis Lavoie, to appear at the bar of their House, the Assembly here could withhold him, and refuse to let him go, thereby denying the supremacy of the House of Commons over the subjects of the British realm, and investing with impunity disobedience to the war-

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(1) 1 Geo. II, Cap. 1.

(2) 4 Moore's Privy Council Reports, p. 70.

rant of its Speaker ; thus declaring the Legislative Assembly here more powerful than the Imperial Parliament, from whom it derives its existence.

If the House Assembly possesses this power, it can only be by possessing the same judicial character as the House of Commons ; the House of Commons is a Court of Judicature (1) Lord Ellenborough in Burdett vs. Abbot (2) expressly puts the right of arrest upon the ground that Parliament is part of a High Court of Judicature. Mr. Justice Bailey, also, held the privilege as an incident to a High Court of Judicature. (3) The House of Assembly is not a Court of Judicature, and consequently cannot exercise such power.

By the Provincial Statutes, which constitute the election law of this Province, a mode of punishment is provided for the offence charged against the Petitioner in this case, and as no British subject can be punished twice for the same offence, the House of Assembly, therefore, has no right to the power which it has exercised on the present occasion.

But admitting for a moment that the House of Assembly has the right of committing for contempt, it can only be by conforming in every particular to the practice of the House of Commons ; in case of commitment by the House of Commons, the resolutions of the House, upon and in virtue of which the Speaker's warrant issues, always recite, "That by virtue of the usages and privileges of the House of Commons, and the law and custom of Parliament, the Speaker do issue his warrant, &c., and these words again are recited in the body of the Speaker's warrant. The resolutions of the House upon which the Speaker's warrant in the present case issued, do not and cannot recite or rest upon any such usage and custom ; and, therefore, the Speaker cannot issue his war-

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(1) Cooke's 4 Inst., 23, 23.

(2) 14 East., 136, 137.

(3) 14 East., p. 150.

rant, and consequently, the warrant in the present case, by not reciting the words employed in the body of the warrant of the Speaker of the House of Commons, is null and void.

If the House claims the right of commitment in special cases, it is for it to show that the present case falls within this class, and, therefore, in the warrant itself, the cause of commitment should have been shewn; on reference to the warrant it will be found that the cause is not alleged, and that, therefore, the warrant is invalid. It has been held in the King's Bench in the case of Howard vs. Gossett, (1) that even the warrant of the Speaker of the House of Commons should state the cause of commitment; it is true that the Court of Exchequer Chamber revising the judgment in this case held otherwise, but this is only with reference to the warrant of the Speaker of the House of Commons, and, therefore, the judgment of the King's Bench in this case should be held good with respect to the warrant of the Speaker of the House of Assembly here; and Mr. Justice Coleridge in rendering the judgment in this case in the King's Bench, speaking of the Speaker's warrant, says: (2) "But the warrant does not disclose that the party was charged with any offence, or had been convicted of any; still less does it show the nature of the offence; neither does it expressly direct the Sergeant-at-Arms to what place to take the body of his prisoner or how long to detain him. If, for the House of Commons, in this warrant, you substitute any other authority known to the constitution, it is quite clear that this warrant would be bad. The party sought to be arrested, would be discharged upon the return to a Writ of Habeas Corpus. It would be a waste of time to enlarge upon this point; and I will only refer to the Petition of Rights, S. C. 1, ss. 5 and 10; Lord Coke's commentary on Magna Charta, c. 29; 2 Just. 52, 53, and 2 Lord Hale's, P. C. 122, 123;

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(1) 10 Ad. & Ellis, 371.

(2) 10 Ad. & Ellis, p. 377.

this last, the rather, because, although he is inclined in some measure to qualify the strong language of Lord Coke, yet the utmost latitude which he will allow is, that there must be a "tolerable certainty in the body of the warrant for what it is, as for felony generally, though the particular is best to be expressed." Upon this doctrine, the warrant in the present case, not having disclosed the cause of the offence, is invalid and illegal, the court cannot inquire into the cause of imprisonment; this could only be done by *certiorari*.

Having argued the broad merits of the question, respecting the power of the house to commit for contempt, I will now shew, that upon points, perhaps of minor importance in themselves, yet, essentially necessary to the validity of the warrant of commitment, the prisoner is entitled to his release.

I maintain that in point of form the warrant is bad inasmuch as it is not addressed to any one for execution; it merely contains an injunction to the Gaoler to receive the prisoner, and is not directed to any one to apprehend or arrest him. In all the instances in England, and in this Province, (1) of commitments under Speaker's warrants, the warrants were either addressed to the Sheriff or Sergeant-at-Arms, or some other officer, for execution; in the cases in England above alluded to, the words to "arrest" or "take" were always used in the warrant; by the warrant in this case it does not appear that the prisoner had notice of the complaint, nor that he has been brought before the House by attachment or otherwise, or that he was present when convicted, or that any opportunity has been afforded him to answer the charge, or that any answer has been asked or given to such charge; the first and only intimation the prisoner has had of the pro-

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(1) Ex parte Tracy, Stuart's R. 479.

ceeding in this case on the part of the House is the commitment in execution ; no precedent exists in support of such a proceeding, it is totally repugnant to the principles of British Law, that a man should be condemned without being heard ; no human tribunal has the right to commit without giving the party accused an opportunity of being heard in his defence , no precedent can be offered in support of such a conviction, but there is one in point against it, the case of Perry editor of the " Morning Chronicle," who was committed on the 22nd March, 1798, for contempt against the House of Lords in publishing a libel in his paper against that body. The commitment runs thus :—" Die Jovis, 22nd Martis, 1798, The Gentleman Usher of the black rod acquainted the House that James Perry had surrendered himself and was in custody. Whereupon he was ordered to be brought to the bar, and having been brought to the bar accordingly, and heard as to what he had to say in answer to the complaint made against him of having published a libel upon this House in the paper entitled, the " Morning Chronicle," Monday, March 19th, 1798, and having acknowledged himself to be the proprietor of the said " Morning Chronicle," he was directed to withdraw. Resolved, by the Lords Spiritual and Temporal, in Parliament assembled, that James Perry having presumed to publish a libel on this House in the " Morning Chronicle," Monday, March 19th, 1798, is guilty of a high breach of the privileges of this House.

" Ordered,—By the Lords Spiritual and Temporal, in Parliament assembled, that James Perry do for his said offence pay a fine to his Majesty of fifty pounds ; and that he be committed prisoner to Newgate for the space of three months, and until he pay the said fine ; and that the Gentleman Usher of the black rod attending this House, his deputy or deputies, do forthwith convey the body of the said James Perry to the prison of Newgate to be kept in safe custody for

the space of three months and until he pay the said fine.  
—George Rose, Clerk, Parliament."

The framers of the commitment in the present case have deviated from the above form in all the essential particulars above adverted to ; if this form is essential to give validity to the commitment of the House of Lords, more especially is this the case, with respect to the commitment of the House of Assembly. To shew the importance of form I will refer to the remarks of Mr. Justice Coleridge in the case of Howard and Gossett : (1) " Experience has shewn that the liberty of the subject, with which we are entrusted, is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required : and in that view of it, it is no paradox to say that form becomes substance. The more powerful therefore the source, and the higher in point of rank, the more strictness ought we to shew, the more accuracy may reasonably be required."

The warrant of commitment in the present case is not signed by any authority that the Court can recognise ; the Constitutional Act of this Province (2) provides for the establishment of a Legislative Council and Legislative Assembly, and these bodies, therefore, the Court is bound to recognise, but that there is nothing in the body of the warrant to shew that the person styling himself " Speaker of the Legislative Assembly of the Province of Canada," was then acting in that capacity, or during the sitting of the House, or under its direction, and if he signed as such Speaker he should have done so correctly, by omitting the words *the Province of*.

There is another objection to the validity of the warrant, and palpably apparent upon the face of it, which in my estimation, even supposing the Court disposed to overrule all the other points which have been contended for in the case,

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(1) 10 Ad. & Ellis, p. 381.

(2) See ante, p. 106.

operates a nullity of it and entitles the prisoner to his discharge : It is that in the resolution (1) upon which the present warrant issued, and in the body of the warrant itself, (2) it is stated, that the offence complained of against the prisoner was committed by him as Deputy Returning Officer for the parish of Les Eboulements, at the late election for the County of Saguenay, whereas on reference to the archives of the Parliament, and to the affidavit of the prisoner himself, (3) it will be found, that the prisoner was not the Deputy Returning Officer at the election mentioned ; but that he has acted as Deputy Returning Officer for the said parish, in the said County, at an election that was held previously to the one referred to in the resolutions and warrant above mentioned ; this objection is fatal, in England the Judges in all the cases above cited did not fail to inquire into the validity of the warrant, and it is in the power of the Court here to examine into the validity of the warrant ; the necessity of this is contended for by Blackstone (4) who says, that " the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made : the Court upon an Habeas Corpus may examine into its validity ; and according to the circumstances of the case may discharge, admit to bail or remand the prisoner." More particularly where a warrant of the House is illegal on the face of it, the Courts will not fail to notice the invalidity ; there never was a warrant in which this illegality was more conspicuously apparent than the one at present under discussion.

Under all these circumstances, I maintain I have shewn sufficient to entitle the prisoner to his release.

(1) Recited ante, p. 102

(2) Recited ante, p 100.

(3) Recited ante, p 103.

(4) 1 Blackstone's Com. p. 137 :—3 Ibid p. 138.

BADGLEY Justice : An application was made to me a few days since for a writ of *Habeas Corpus*, to bring up the body of Louis Lavoie in confinement in the common jail of this district, accompanied with the requisite affidavit of probable cause, and in consequence the writ was directed to issue. The party, in consequence, was heard at length upon his application, and I shall now proceed to explain the grounds upon which my judgment rests : it must, however, be premised that as no other material for judgment than the writ and return has been submitted, it is necessary to read the return, which submits the Warrant of commitment as the only cause of detention.

His Honor here read the Warrant and Return above recited, and continued :

It becomes expedient to advert to the laws, whether statute or otherwise, in force in this Province as our guide for decision in this matter. I am not willing to go beyond these and incumber the case with English authorities and precedents unless they specially apply, and I shall therefore at once proceed to examine *in limine*, the statutory enactments of Canada which appear to me to bear upon the subject. The statutes which offer themselves to our notice are the Provincial election law and that for regulating controverted elections.

The first is the 12th Vic. chap. 27, regulating the elections of Members to serve in the Assembly, and this provides for the appointment of Returning Officers, who shall commission Deputies to open and hold Polls in Parishes and Townships, according to law, and to take and record the votes of the electors therein, and make returns thereof to the Returning Officer, who in his turn of duty reports the returns to the proper depository, the Clerk of the Crown in Chancery. The machinery of electing members being thus constituted by Statute, the Legislature has also provided means by which

the House of Assembly is enabled to examine into the proceedings of those officers who report the suffrages of the country, and by their returns constitute the Legislative Assembly. It must be evident, therefore, that a power must exist somewhere for the confirmation and approval of the conduct of Returning Officers in the performance of their most important duty, where it is correct, and for their supervision and punishment where their conduct is otherwise. Where and how does that power exist, and in what manner does it operate? The statute for the trial of controverted elections, 14 and 15 Vic. cap 1, furnishes an answer to both inquiries by constituting the House of Assembly itself into a judiciary body, in addition to its Legislative functions, and establishing a *modus operandi* for giving effect to those functions. The statute provides that every election petition complaining either of an undue election or return, or of no return, or of special matters contained in such returns, shall be brought up as a matter in which the privileges of the House are concerned; it provides that notice shall be given to the Returning Officer if his conduct shall be complained of in the petition; that a select Committee, exercising by delegation the general power of the House of Assembly, shall try the merits and report their finding; that in the course of their investigation they may require the attendance of witnesses who shall be heard on oath, and whose refusal to attend or answer shall subject them on the report of the Committee to the interposition of the authority or censure of the House, and the commitment of the witnesses to custody for a limited period; that the Committee may find and report any resolutions independently of their report upon the merits of the petition whether there be a valid return or no return, &c., and which may be adopted by the House, who are authorized to make such orders on the special finding or report as to the House may seem proper; that in the event of the contravention of any of the directions contained in this Act, by the Select Committee

and officers of the House, or of the Commissioner for taking evidence on the petition, or of any Clerk, Bailiff or other officer acting under such Commissioner, all these become amenable to commitment to the custody of the Sergeant-at-Arms, to be otherwise dealt with at the discretion of the House by censure or imprisonment, or by requiring them to make satisfaction to the party concerned or interested in the Election petition, and by commitment in execution for such period as the House in their discretion shall deem just; and finally, that in cases where no express provision is made by the Act, and in which, if treated wholly without the purview of the act, there would be a manifest failure of justice, it is made competent for the House to deal with them, and to take such proceeding thereon as shall be most consonant with the spirit and intent of the statute. I omitted to mention that in the Election Law it is provided that if the Deputy Returning Officer should refuse to attend upon the Returning Officer on the loss of the poll-books, and then and there state on oath the number of votes taken and other particulars mentioned in the act, he may be committed by the Returning Officer, to prison, from which he cannot be delivered, but must there remain until discharged by order of the House to that effect. The result of these statutory provisions evidently must be that the House of Assembly is clothed with undoubted judicial powers which would be null if they had not the authority to enforce them; that Returning Officers and their deputies have been and are subject to punishment by the House for malversation, that malversation being an especial breach of the privileges of the House, as an attempt to put in or keep out a Member unjustly; and that the general power accorded in cases not specially provided for in the statute, must almost always relate to the Returning Officer or his Deputy, or to some person not a Member, in respect of whom the House is authorized to make such orders as to the House may seem proper, necessarily

implying the power subsisting in the House to enforce such orders. It may also be assumed that the power to imprison, incidentally mentioned in the 159th section of the Act is not stated as a new power, for then special provisions for carrying it out would have been made ; but it is mentioned as a power which, existing in and belonging to the House in the case referred to in that section, is to be exercised by the House ; in fact, if the House had not power to send for Returning Officers, these could not be compelled to amend their return, which is often necessary, they might defy the order of the House without this power of compulsion, and surely the Deputy on every principle of common sense and of law must be equally amenable to the same judicial power of the House. The House of Assembly have the unquestionable peculiar power of determining judicially all matters touching the election of their own members, including therein the performance of the duty of those officers who are entrusted with the regulation of the election of those members. Very many cases have occurred in England in which this right to determine the legality of returns, and the conduct of Returning Officers in making them, has been recognized long before the existence of the Imperial Statute, 9 Geo. 4th, cap. 22, from which our contested elections act has been copied, and that right may be assumed as one of those incidents which must belong to the constitution of every representative assembly. It is well nigh useless to enlarge upon this point of the case, or to refer to the power of the House to supply vacancies after a general election, to amend returns, to expel members, &c., &c., &c., for the purpose and with the view to establish the completeness of their jurisdiction in matters of election.

The points in this case have turned upon the assumed or alleged questionable privileges of the House of Assembly in their collective capacity, and chiefly as to their power to com-

mit for breach of their privileges. It is quite true that the power to declare what is privilege, is a most extreme power in a legislative body whose legislation and jurisdiction are united in the same persons, and exercised at the same moment, in declaring a law which cannot be known because it is *ex parte*, and where the party is both legislator and judge, and the jurisdiction is without appeal. That power, however, has been exercised for centuries in England, but in the argument of the counsel at the bar it has been roundly denied to the House of Assembly here. It may be proper to observe that the power of commitment by the House of Commons for the enforcement of their privileges has been recognized by Courts of Law in a great number of cases, especially from 1704 to a very recent period, by 11 of the Judges in the case of the Aylesbury men, (1) until very recently in 1852 in a case of Lines before the Court of Exchequer. The most eminent Judges of England have settled this jurisprudence,—men as much admired for their eminence as lawyers, as for their independence in the faithful discharge of their duties as Judges. But, it is said, granting this privilege to the House of Commons, the right to its exercise is only founded upon the law and custom of the Imperial Parliament, and that in fact it is not an attribute or an incident of the House of Assembly of this Province, because it has not been conceded expressly by the Crown; that the Crown had no right to grant it, not having itself a right to exercise privilege, and therefore incapable of granting what the grantor had not to grant; and the case of Kielley vs. Carson before the Privy Council in 1841-2 has been relied upon, as well as that of Cuvillier vs. Munro in the Q. B., at Montreal in 1848. Neither of these cases, however, goes the length of the argument of the Counsel. In the latter case, the Court were of opinion that as a general proposition, the

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(1) 2 Ld. Raym. 1105 :—By Court of K. B., in Murray's case, 1 Wils. 299, 1751 :—Court of G. P., Crosby's case, 3 Wils. 203, 1771 :—Court of Exchequer, Oliver's case 1771, K. B. :—In Burdett's case, 1811 :—In Hobhouse's case in 1819 :—Sheriff of Middlesex, 1840 :—Exchequer Chamber, Howard's case in 1846.

members of the House of Assembly ought to be protected from arrest under civil process on the ground of necessity, and that as necessity was the origin and foundation of the privilege, so this same necessity must be the measure of it ; that is, that a member's legislative functions would be interfered with, and the discharge of his duties to his country prevented, by the process. The plea of privilege was refused because the party was not within the necessity. The Parliament was not in session at the time, nor was he in the case of being at the Assembly or going from or coming to it, *eundo, morando, redeundo*. In the case of Kielley vs. Carson, the substance of the judgment was concurred in by all the Judges, which is that the House of Assembly of Newfoundland, as a local Legislature, had every power necessary for the exercise of its functions and duties, and for its existence. These cases do not carry out the broad principle maintained at the bar, and it may be sufficient to observe upon this point of the case, that the matter involved in this application is the arrest and commitment of a Deputy Returning Officer, for malfeasance in the discharge of his duties as such, and for which the House of Assembly had right of cognizance as a power necessary for its existence, and the proper exercise of its functions. It may be proper here to notice that the Legislature of Newfoundland was only a charter government until 1842, that it was constituted by Royal Charter in 1832, and that neither the charter nor the Royal instructions to the governor made grant of the privilege claimed to be exercised by that House. That case, moreover, was of a nature entirely different from this, nor will I lose time in referring to the cases of Howard vs. Gossett, Burdett, Hobhouse and others : all these turned upon the right and power and privileges of the House of Commons, which though questioned, were sustained upon the principle that the law and custom of the Imperial Parliament formed part of the law of the land, and being exercised by a judicial body, a court of high eminence, it

was not competent for any other Court, however elevated, to question the exercise of its authority in matters of contempt, which by common judicial consent could only be inquired of by the committing court. None of these cases are parallel with the case in hand, and in consequence do not apply. It has been said that the judges have no power to issue writs of Habeas Corpus in matters of commitment by the House of Assembly. It might be sufficient to remark that such a power is unquestioned in England in commitments by the House of Commons, and following such precedents, the judges in this country have unquestionably a similar right to exercise and enforce it. The Habeas Corpus is binding upon all persons whatever who have prisoners in their custody, and it is therefore competent for the judges to have before them prisoners committed by either House for contempt—a denial of this right argues an entire ignorance of law and of precedent, even in this country in which occurred the cases of Bedard, Tracey and Duvernay. The writ *ad subjiciendum* is deemed a prerogative writ which the sovereign may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined. It is also in regard to the subject, deemed his writ of right, to which he is entitled *ex debito justitiae*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption and the cause of detention to be returned. (1) The obligation of Judges to issue the writ, and of gaolers to act in obedience to it, are established by statutes under heavy penalties on contravention of the requirements of law in that respect. Admitting then the propriety of the issuing of the writ of Habeas Corpus in this case, the question follows: Can the Judge inquire into the validity of the warrant itself.—It has been decided again and again in England, and is now a principle established beyond all question, that the cause of commitment by either

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(1) Bac. Abr. Habeas Corpus:—2 Gabbett's, Crim. Law, p. 181.

House of Parliament cannot be inquired into by Courts of Law, but that their adjudication is a conviction, and their commitment in consequence an execution, and no court can discharge or bail a person who is in execution by judgment of any other tribunal ; yet if the commitment should not profess to be for a contempt, and the matter appearing in the return as the ground of the commitment, could by no reasonable intendment be considered a contempt, and the commitment therefore evidently arbitrary, unjust, and contrary to every principle of positive law or natural justice, (which, however, may not be anticipated to occur) the court would, it seems, not only be competent but bound to discharge the party. Burdett vs. Abbott (1) And in fact no greater power can be claimed in these matters of contempt, than is readily conceded by the courts to one another, but still a commitment by either House of Parliament may be examined upon a return to a *Habeas Corpus*. It may again be said that this applies to the British House of Parliament, but not to the Provincial House of Assembly. The answer has already been given, and may be found in the judicial character of the House acting in this case, and the practice in matters of contempts. There only remains a matter of form, and here, although the warrant is not drawn with all the technical accuracy that might be desired, there is enough on the face of it to sustain the commitment. In ordinary warrants, the requisites are few in number ; they should be in writing, under the hand and seal of the Justice ; his name and authority at the time of making it are to be set forth, and they should be usually directed to both Constable and Gaoler ; the prisoner must be described in them by his name and surname, though if not known, it is sufficient to describe him by his age, stature, complexion, colour of his hair and the like, and to add that the prisoner refused to tell his name. (2)

(1) 14 East 150.

(2) 2 Gabbett, 178 :—1 Chitty, C. L. 110.

The commitment need not state that the party is charged on oath, but should contain the cause with sufficient certainty, in order that the party may know upon what precise charge he is imprisoned, and that if he is removed by *Habeas Corpus*, the Court may judge whether it were a reasonable or sufficient ground for his imprisonment, (1) and therefore, in principle, though it need not be so special or technical as an indictment yet it should contain the substance of it, or of the offence with which the prisoner is charged thereby. But with reference to this commitment, assuming that the House of Assembly had, under the Statutes, judicial powers, and that the warrant issued in the exercise and in virtue of those powers, the authorities of English Law must prevail, and by them it is established incontrovertibly that the commitment may be by warrant, stating generally that a contempt or breach of privilege has been committed, without setting out the particulars of the contempt. Where, therefore, a commitment under such warrant is returned to a writ of *Habeas Corpus*, the Courts of Law cannot discharge the prisoner. (2)

In this case I have confined myself to the right of the party, as it appears before me, and as the matter has been submitted by the Counsel with considerable talent and research, it has been unnecessary to consider the effect of such a warrant under other circumstances, or the power and authority of the House of Assembly under a different combination of circumstances. I abstain altogether from every other matter or right than the case before me which I am required to adjudicate upon, and which, to my mind, is a question, arising out of an examination of the Statute Law of the land, and the legal precedents and authorities of Courts of Justice. Upon these the judgment has been founded, and upon these alone. I

(1) 2 Gabbett, 178.

(2) See cases of Sheriff of Middlesex :—*Regina vs. Gosset*, 3 P. & D. 346 :—*Burdett vs. Coleman*, 13 East, 27 and 14 East, 163 :—*Rose vs. Hobhouse*, 2 Chitty, 207 :—*Rose vs. Flower*, 8 T. R., 374 :—*Murray's case*, 1 Wils. 290 :—*Howard vs. Gossett* Exchequer Chamber, 10, Adolphus & Ellis, p. 417.

shall merely observe in addition, that the return alone can be looked at ; no extrinsic evidence can be admitted. Under all these circumstances, considering this case, as I have said, to be a matter of Law to be governed by the interpretation of Statutory enactments, and the powers conceded by them, and feeling it impossible to overlook or override the precedents of Courts of Law, I am in duty bound to remand the prisoner until he shall be delivered by operation of law.

Judgment accordingly.

CASGRAIN P. B. Counsel for Petitioner.

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### COUR SUPERIEURE.—QUEBEC.

Présents : BOWEN, Juge-en-Chef, MORIN et BADGLEY, Juges.

No. 2007. { LEE,.....*Demandeur,*  
vs.  
L'ASSOCIATION DE LA SALLE DE MU-  
SIQUE.....*Défenderesse.*

Jugé :—Que dans le cas d'inexécution d'un contrat de louage ou autre, le preneur n'a droit de recevoir que les dommages qui résultent directement de telle inexécution, et non ceux qui n'en ressortent pas naturellement, et que les parties n'ont pu prévoir ; que le preneur ne peut réclamer, comme dommages, ce qu'il aurait pu gagner, par suite d'un événement imprévu, en sous-louant l'édifice pour un objet autre que sa destination ordinaire ; que le Demandeur, ayant loué un théâtre, ne peut réclamer sous forme de dommages ce qu'il aurait pu recevoir du Gouvernement pour renoncer à son bail, les chambres législatives ayant été depuis détruites par un incendie, et le théâtre étant le seul local convenable pour les séances de la Législature.

Held :—That in the case of the non execution of a contract of lease, the lesssee can only recover such damages as are the immediate result of such non execution, and not the consequential damages which the parties could not have foreseen ; that the Plaintiff cannot recover, as damages, what he might have made in consequence of an unforeseen event, by subletting the building for a purpose foreign to its legitimate use ; that the Plaintiff having leased a theatre cannot claim in the shape of damages what he might have received from the Government for giving up his lease, the legislative buildings having since such lease been destroyed by fire, and the theatre being the only building fit for the sittings of the Legislature.

Jugement rendu le 9 Avril, 1855.

Le Demandeur réclamait de la Défenderesse la somme de £1000, courant, de dommages, intérêts, pour l'inexécution d'un contrat de louage. Il alléguait dans sa déclaration que

le ou vers le cinq Avril, 1854, la Défenderesse lui avait loué, pour l'espace de pas moins de quatre semaines et de pas plus de huit semaines, à compter du 15 Juin suivant, la Salle de Musique de Québec, (The Quebec Music Hall,) pour y donner des représentations dramatiques ; et que le 15 Juin, la possession de cet édifice lui avait été refusée, à son dommage de la somme de £1000 courant. Il alléguait de plus des dommages particuliers, résultant de ce qu'il avait pris des engagements avec des acteurs, et qu'il était obligé de les indemniser. A cette action la Défenderesse plaida par une défense en fait, et par une exception. Cette exception alléguait en substance qu'une des conditions du bail était que le Demandeur devait fournir des cautions, qu'il avait été mis en demeure de fournir tel cautionnement, et s'y était refusé, et qu'en conséquence il y avait résolution du bail.

A l'enquête, les faits suivants furent prouvés :

Dans le mois d'Avril, 1853, un ami de M. Lee s'adressa à l'un des directeurs de l'association de la Salle de Musique pour louer leur édifice, et le prix, (£30 par semaine) fut arrêté entre eux. Subéquemment, le même directeur informa l'agent de M. Lee qu'on exigerait un cautionnement, ce à quoi l'agent refusa d'accéder, proposant d'y substituer des paiements en avance. Cependant, le 27 Mai, 1853, le bureau de direction réuni donna instruction à M. Wheeler, le gardien de la salle, d'écrire au Demandeur qu'on insistait à avoir des cautions, ce qu'il fit dans les termes suivants :

“ Avant d'avoir le théâtre, il est indispensable que vous donnez au comité un bon et valable cautionnement pour le paiement du loyer.”

“ Quand vous aurez réglé tous les préliminaires, envoyez-moi une liste, etc.”

A cette lettre le Demandeur répondit le 1er Juin, 1853, comme suit :—

Tous les préliminaires sont réglés par mes amis, M. McD., M. H. et M. D."

Vers la mi-juin, le Demandeur arriva à Québec, et de suite prit possession du théâtre, et s'occupa d'y faire les arrangements préliminaires.

' Il fut constaté alors que M. Lee n'avait point donné le cautionnement, ou, en d'autres termes, rempli les préliminaires requis, ainsi qu'il l'avait dit dans sa lettre du 1er Juin, et il fut mis en demeure de fournir ce cautionnement. En définitive, le tragédien Wallack se présentant comme son associé, et comme partageant la responsabilité avec lui, l'on se contenta de paiements d'avance, et de fait le cautionnement ne fut jamais donné. En Avril, 1854, l'agent du Demandeur ayant de nouveau demandé le théâtre, la lettre suivante lui fut écrite :

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MUSIC HALL, Quebec, 5th April, 1854.

SIR,

I am instructed by the Committee of management to state, in answer to your note of this day, addressed to Mr. Lelièvre, that the Committee cannot accede to Mr. Lee's request of letting the Hall at £25 per week.

In consideration of Mr. Lee having been the first to introduce a Company to the Music Hall, the Committee in his case will be willing to accept of the same terms as last year, namely, £30 per week, exclusive of Gas, provided that it is taken for a period of not less than four weeks nor exceeding eight weeks.

This amount is considerably less than what the Committee would expect from strangers.

I remain,

Sir,

Your Obedient Servant,

W. W. WHEELER, Supt.

W. A. Himsworth, Esqr.

A cette lettre, l'agent du Demandeur répondit comme suit :—

Quebec, 6th April, 1854.

Sir,

In answer to your letter of yesterday's date, communicating the decision of the Music Hall Committee on Mr. Lee's proposal to hire that building, in Mr. Lee's name, I beg to say that he accepts of the terms offered by the Committee, viz: payment of a rent of £30 per week (exclusive of Gas) for a period of not less than four and not exceeding eight weeks, or in other words the same terms as last year.

Mr. Lee's lease will commence on or about the 15th June, but on this point you may expect a communication from himself in a day or two.

I remain, Sir,

Your Obt. Servant,

W. A. HIMSWORTH.

W. W. Wheeler, Esq., }  
Music Hall. }

Cette lettre fut suivie d'une autre du Demandeur, qui est comme suit :

Montreal, April 8th, 1854.

Sir,

Mr. Himsorth has enclosed to me your letter of the 5th instant, and also a copy of his reply thereto.

I beg to say that I adopt the terms thereof, and am willing to give £30 a week (exclusive of Gas) for the Music Hall, for a period of not less than four and not exceeding eight weeks, commencing on or about 15th June next. I have

little doubt but that I shall be able to make my arrangements for that exact date.

I am, Sir,

Your most Obt. Servt.,

JOSEPH S. LEE.

W. W. Wheeler, Esq., Supt.

Les choses en restèrent là jusque vers le commencement de Mai 1854.

Dans le mois de Février précédent, les édifices destinés aux séances de la Législature, en la Cité de Québec, avaient été consumés par un incendie. Le gouvernement s'était procuré pour les remplacer l'Hospice des Sœurs de la Charité, qui fut également détruit par un incendie le 5 Mai, 1854. Le Parlement devait siéger le 23 Juin suivant, et le seul édifice convenable qu'il fut possible de se procurer pour cet objet était la Salle de Musique. Le gouvernement en demanda le louage. Le Bureau de Direction de cette institution dépêcha immédiatement un agent auprès du Demandeur, pour le requérir de signer un bail et de fournir le cautionnement que l'on prétendait avoir droit d'exiger. Le Demandeur refusa de donner des cautions, et le bail fut considéré comme résolu. L'édifice fut loué au gouvernement, et ne put en conséquence être livré au Demandeur.

De là l'action en dommages intentée par le Demandeur. Ce dernier ne profita aucun dommage résultant d'engagements pris avec des acteurs, ni de la perte d'aucun profit qu'il aurait pu faire au moyen de son entreprise dramatique. Il se contenta d'établir que la Salle de Musique était le seul édifice à Québec, propre aux séances de la Législature, et qu'en conséquence il aurait pu obtenir du gouvernement une prime de quatre ou cinq cents louis, pour renoncer à son bail.

De la part de la Défenderesse il fut prouvé que le Gouvernement n'aurait certainement point loué l'édifice pour quatre

ou huit semaines seulement, et que vu l'existence du choléra à Québec, durant l'été de 1854, une entreprise dramatique n'aurait nullement réussi. Cette preuve faite, la cause fut plaidée.

**IRVINE**, pour le Demandeur, dit : Qu'en effet il n'avait prouvé aucun autre dommage, que la perte d'une somme considérable qu'il aurait indubitablement eue du Gouvernement pour renoncer à son bail ; mais qu'il avait droit à un équivalent pour cette perte, attendu que la Défenderesse avait volontairement refusé d'exécuter le bail. Quant au cautionnement, il soutenait que d'après la preuve, la Défenderesse n'y avait aucun droit.

**ANGERS**, pour la Défenderesse, dit : Que le bail de 1854, devait être fait aux mêmes conditions que celui de 1853, c'est-à-dire, à la condition de fournir un cautionnement tel qu'exigé par la lettre du 27 Mai, 1853, et promis par celle du 1er Juin, même année. Quant aux dommages il soutenait qu'il n'y avait aucune preuve quelconque que le Demandeur en eut éprouvés ; que le Demandeur ne pouvait réclamer des dommages non prévus lors du contrat, et qui ne découlaient pas directement de la transaction. Que d'ailleurs le Demandeur ne pouvait sous-louer l'édifice pour en changer la destination, sans le consentement de la Défenderesse ; et conséquemment n'avait pas le droit absolu d'en disposer, ce qui seul pouvait donner lieu à l'action en dommage. (1)

La Cour déclara qu'il résultait de la correspondance entre les parties, et de la preuve verbale, que l'obligation de donner des cautions n'avait pas été assez clairement stipulée pour que la Défenderesse put insister sur ce point ; mais que vu qu'il n'y avait aucune preuve de dommages, la Cour n'accorderait que des dommages vindictifs, pour raison de l'inexécution du bail ; que cependant elle ne pouvait accorder

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(1) Pothier, Oblig., No. 161, No. 162.

comme dommages ce que le Demandeur aurait pu recevoir du Gouvernement, attendu que cela n'était pas prévu lors du contrat, et n'en était pas une conséquence directe. (1)

Jugement pour £20 avec frais.

**HOLT et IRVINE**, pour le Demandeur.

**LELIEVRE et ANGERS**, pour la Défenderesse.

**ALLEYN**, Conseil.

### SUPERIOR COURT.—MONTREAL.

Before **DAY, SMITH and VANFELSON**, Justices.

{ **THE SAINT LAWRENCE AND OTTAWA  
GRAND JUNCTION RAILROAD CMPY. Plaintiffs,**  
**FROTHINGHAM et al.,..... Defendants.**

Held:—That in an action by a Railway Company, against a Stockholder for calls, it is sufficient for such Company to state in the caption of the declaration that it is a body politic and corporate without a specific allegation to that effect.

The mode of raising an objection, as to the sufficiency of the allegation of the corporate capacity of a Company, is by an exception à la forme, and not by a défense au fonds en droit.

Jugé:—Que dans une action par une Compagnie de chemin de fer, contre un Actionnaire pour versements, il est suffisant que telle Compagnie dans l'intitulé de la déclaration allègue son existence comme corps politique et incorporé, sans qu'il soit besoin d'un allégé special à cet effet.

Le mode de soulever une objection, quant à la suffisance de l'allégé que la Compagnie est corps incorporé, est par exception à la forme et non par une défense au fonds en droit.

Judgment rendered the 28th February, 1855.

In the writ the Plaintiffs were described as "The Saint Lawrence and Ottawa Grand Junction Railroad Company." The declaration was as follows: "The Saint Lawrence and Ottawa Grand Junction Railroad Company, a body politic and corporate duly incorporated by Act of the Parliament of

(1) Sedgwick, on Damages, pp. 63 to 73:—Code Civil Arts. 1149, 1150, 1151:—“Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier, et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de sa convention.”—10 Duranton, Nos. 480, 481:—6 Toullier, p. 290, No. 284:—Argou, Institution au Droit Français, Paris, 1767, p. 87, liv. 1, part. 1, ch. 1, § V.

this Province, Plaintiffs, complaining of John Frothingham, William Workman, Thomas Workman and George H. Frothingham, of Montreal, carrying on business as Hardware merchants, at Montreal aforesaid, in partnership under the name and firm of Frothingham and Workman, Defendants, say: That Defendants were and are holders of 40 shares of £12 10s each, current money of this Province, of the Capital Stock of the Plaintiffs, and heretofore, to wit, on the 1st day of June last past, were indebted to the Plaintiffs in the Sum of £50 currency, for two several calls or instalments of and on the said shares, and which calls or instalments the Defendants were, and are liable, and promised to pay to the Plaintiffs, together with interest on the paid calls or instalments from the dates on which they respectively became due and payable, the said interest accrued to the first day of June, to wit, of June now last past, amounting to the sum of £3 15s ; further more, in the sum of £2 10s currency, as and for the penalty, to wit, a penalty of five per cent on the amount of the above calls or instalments, for which the Defendants are liable as aforesaid, yet the said Defendants refuse to pay the said calls and interest and penalty as aforesaid ; conclusion for £46 5s currency, with interest on £50 from the first of June last and costs. *Défense au fonds en droit* on the following grounds.

1. Because it is not alleged in the declaration, nor does it appear that the Plaintiffs were ever incorporated, or that they are a corporation.
2. Nor that the Defendants are copartners.
3. Nor that any section of the said road not than less 25 miles in length has ever been completed, or that the Plaintiffs have ever assumed the name of the St. Lawrence and Ontario Grand Junction Railroad Company, or that they ever gave notice in the " Canada Gazette," of their assumption of the said name.

4. Nor that the Montreal and Lachine Railroad Company were unable to commence the Saint Lawrence and Ontario Grand Junction Railroad, within three years from the passing of the Statute 13 and 14 Vict., intituled, " An Act to continue and extend the Montreal and Lachine Railroad, and to incorporate the Saint Lawrence and Ontario Grand Junction Railroad Company," or that it was declared by a resolution of the Montreal and Lachine Railroad Company, that the last named Company would not make and complete the said Railroad and other works.

5. Nor that Books of subscription were opened as provided by the 14th section of the said Statute, or that 1000 shares of Stock had been subscribed, or that a general meeting of subscribers had been held after the notice mentioned in the thirty-first section of the said Statute.

6. Nor that the Defendants had subscribed the books of subscription, or were proprietors of any shares, or that any shares were ever subscribed for, or any calls made ; or three weeks notice of any calls given in the Canada Gazette or in any other manner.

7. Nor that any legal contract existed between the Plaintiffs and Defendants.

8. Reasons general.

**ABBOTT, for Defendants :** The Plaintiffs were bound to have set forth the fact referred to in the Statute, and alleged compliance with all the conditions upon the fulfilment of which alone they could be considered as an incorporated Company, or have any powers as such.

By the 21st section of the Statute, it is enacted that the Lachine Railroad Company's powers cease if the Road is not commenced by them within three years from the passing of the Act, and that after completion of 25 miles of Road,

that Company may assume the name of the Saint Lawrence and Ottawa Grand Junction Railroad Company ; by the 22nd section, it is enacted : " That in the event of the " Montreal and Lachine Railroad Company, being unable " to commence the said Road within the said period of three " years aforesaid," that certain persons named should be a body politic and corporate by the name of the Saint Lawrence and Ottawa Grand Junction Railroad Company, and that in case of the Road not being commenced within the three years, " or in case of its being declared by a resolution " of the Directors of that (the Lachine) Company, that the " last named Company will not make and complete the said " Railroad and other works, then and in either of the said " two cases, the Saint Lawrence and Ottawa Grand Junction Railroad Company, shall have all the powers which " the said Montreal and Lachine Railroad Company could " have had or exercised, &c." By the concluding portion of the same section, it is enacted that " in either of the two " cases aforesaid it shall be lawful for any three persons " incorporated by the present Act to cause books of subscription to be opened in the manner provided by the 14th sect. " of this Act, and as soon as 1000 of the said shares shall " have been subscribed, a general meeting of the subscribers " shall be held for the purpose of electing Directors in the " manner provided by the 31st section of the said Act incorporating the Montreal and Lachine Railroad Company ; " and thereupon all the provisions of law applicable to and " serving to regulate the affairs of the said Montreal and " Lachine Railroad Company, shall be applicable to and " regulate the affairs of the said Saint Lawrence and Ottawa " Grand Junction Railroad Company." The Defendants are entitled to know whether they are sued by the Lachine Company, as having complied with the requirements of the Statute, or by the Plaintiffs as an Independent Company incorporated conditionally, and whose powers only com

mence on shewing compliance with the conditions and requirements of the Statute ; the simple assumption of the quality of a corporation in the declaration is not sufficient, there being no substantial allegation of their existence as a corporate body, and no allegation of a valid subsisting contract between the said corporate body and the Defendants, as a commercial firm, holding shares in the body primarily or conditionaly incorporated.

CROSS, for the Plaintiffs : The corporate capacity of the Plaintiffs is sufficiently alleged, the existence of the company is matter of proof, and a legal contract is sufficiently shown by the declaration ; the action is in fact brought in the form prescribed by the 14th section of the Statute referred to, which is applicable as well to the Plaintiffs as a corporation, as to the Montreal and Lachine Railroad Company.

DAY, Justice, after stating the manner in which the declaration was drawn and the pretensions of the Defendants, said : We are all dissatisfied with the form of this declaration ; it gives the name of the Plaintiffs as a body politic and corporate duly incorporated by a Statute of this Province. This is part of what in England would be called the caption ; here it might probably be looked upon as an allegation. Such a setting forth of his quality by a tutor has been held sufficient. On the whole we think it sufficient in the present case, taking it as an allegation ; we think the proper way of taking advantage of the alleged defects should have been by exception *à la forme* and not by *défense au fonds en droit*. The question raised by the defence is, taking every thing alleged to be true : can the Plaintiffs recover ? We think the answer must be in the affirmative, although the case is not without difficulty.

Judgment—" Considering that the said Saint Lawrence " and Ottawa Grand Junction Railroad Company are " designated and described as a body politic and corporate,

"duly incorporated by Act of the parliament of this Province,  
 "and that the said declaration and action ought not, by reason  
 "of any thing assigned by the Defendants in support of the  
 "said *défense en droit*, to be dismissed, doth dismiss the said  
 "défense en droit with costs."

Cross, for Plaintiffs.

BADGLEY and ASSOTT, for Defendants.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MEREDITH, and BADGLEY,  
 Justices..

|           |                  |                   |
|-----------|------------------|-------------------|
| No. 1554. | { FERGUSON,..... | <i>Plaintiff,</i> |
|           | vs.              |                   |
|           | { GILMOUR,.....  | <i>Defendant.</i> |

In an action on the case for slander, one witness proved that the Defendant, speaking of the Plaintiff, had used the word, "whore," and said, that "she had been kept by a gentleman," whose name the witness gave; and a second witness proved, that the Defendant, on a different occasion, speaking of the Plaintiff, had said: "she has been frequently seen in the company of a gentleman," mentioning the same name as that sworn to by the witness.

Held:—1. That there was not sufficient proof to warrant a verdict for the Plaintiff, and that the testimony of the second witness was not corroborative of the evidence of the first;

2. That a communication by a merchant to his clerk, in his private office, affecting the character of a third person, made in the course of a conversation occasioned by the absence from his duties of another clerk of the merchant, is a privileged communication.

Dans une action pour diffamation, un témoin prouva que le Défendeur en parlant de la Demanderesse s'était servi du mot "putain," et avait dit "qu'elle avait été entretenue par un monsieur," que le témoin nomma; et un second témoin prouva que le Défendeur, dans une autre occasion en parlant encore de la Demanderesse avait dit: "elle a été fréquemment vue avec un monsieur," nommant la même personne que le premier témoin avait indiquée dans son témoignage.

Jugé:—1. Que cette preuve n'était pas suffisante pour soutenir le verdict du jury en faveur de la Demanderesse, et que le témoignage du second témoin ne corroborait pas le témoignage du premier;

2. Qu'une communication par un marchand à son commis, faite dans son comtoir, affectant le caractère d'une tierce personne, dans une conversation occasionnée par l'absence d'un autre commis de ce marchand, est une communication privilégiée.

Judgment rendered the 9th April, 1855.

The case came before the Court upon a motion by the Defendant, that the verdict of the Jury rendered in this cause on the 11th October, 1854, "be set aside, and a non suit entered, or the judgment be arrested, or a new trial be

"granted." And upon a motion by the Plaintiff, for judgment upon the same verdict :

The action was on the case for slander. Two verdicts were rendered. The first trial took place before CARON, Justice, and a special jury, in December, 1853, when a verdict was rendered against the Defendant, for £600 currency, damages. Upon the application of the Defendant, the Superior Court granted a new trial, on the ground that the finding of the jury, in answer to the first question, was not in accordance with the requirements of the law, inasmuch as the finding was, that the words charged, 'or words to the same effect,' were used, whereas the jury should have found the words charged. (1)

The second trial took place in October, 1854, before DUVAL, Justice, and another special jury, (mixed English and French at the instance of the Defendant,) and the second verdict was rendered in favor of the Plaintiff for £500 currency, the jury finding that the slander complained of had not caused the loss of the Plaintiff's marriage.

It was upon motion by the Plaintiff for judgment pursuant to the verdict, and upon motion by the Defendant to set aside the verdict and for a nonsuit, or the judgment arrested, or a new trial granted, that the following judgment was pronounced :

**BOWEN**, Chief Justice : In this case there are two motions before the Court, the one for judgment in favor of the Plaintiff upon the verdict as rendered by the Jury in this cause, the other to the effect of setting that verdict aside, either by causing a non suit to be entered, by quashing and annulling the verdict, and in the event of the Court not complying with either of these particulars, then by granting a new trial.

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(1) Vide 4 L. C. Repts., p 57, where a full report of the evidence adduced before the Jury, and of the argument on the application for a new trial, will be found.

Prior to our present Jury System in civil cases, the finding of a Jury upon the issues of fact was held to be conclusive, unless the Judge who tried the case was dissatisfied with the verdict, as considering it contrary to evidence, or that the Court from which the *venire* issued convinced itself that there had been a misdirection of the Jury, the Judge who tried the case being held, upon application for that purpose, to produce and read to the Court his notes of the trial, and of his summing up to the Jury ; under the present anomalous mode of proceeding, the Judges are first called upon to settle the issues, and to direct questions of fact for the Jury to answer, and the evidence being taken down in writing, is afterwards submitted to and adjudged upon by the Court, not only by the Court from which the *Venire* issues, but also by the Court of Appeals, either of which may entirely reverse the finding of the Jury not merely as to the law, but as to the facts of the case : this first occurred; here, in the case of Casey and Goldsmid. (1) in which upon a writ of appeal being presented for allowance we made a special return, that, from the finding and verdict of a Jury, a Writ of Error and not a Writ of Appeal was the fitting course to be pursued ; this special return was however overruled by the Court of Appeals, and the record being sent up, that Court decided the facts of the case in direct contradiction with the finding of the Jury. The sooner, in my humble opinion, the present law is repealed, and the old and well established form of trial by Jury restored, the better in the interest of suitors. Proceeding, however, as we are now bound to do, to examine the record and proceedings had in this case, we find that three witnesses only have been examined on the part of the Plaintiff, viz : James Patton, John Harvey and George Railton. Patton proves he had a conversation with the Defendant in the fall of the year 1852. " When on the occasion of my absence," says the witness, " he told me I must abandon the dissipated life I was leading, and absenting

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(1). 2 L. C. Rep 200 :—2 L. C. Rep. 212.

myself from his office. He told me, also, if I was so fondly attached to the Plaintiff, "why not marry her;" upon his cross examination he says : "this took place in the spring of 1853," when he went to re-engage himself with Gilmour, the Defendant, but is positive that when the Defendant sent for him, in the autumn, he was living with the Defendant at Mr. Faucher's or Mr. Robitaille's ; and when the Defendant said : " If I was so fondly attached to marry her, that was in the fall of 1852," (apparently Gilmour said so to him on both occasions) " I can conscientiously swear that Defendant never did directly or indirectly dissuade me from marrying the Plaintiff."

The next witness John Harvey knows nothing of the matter, and proved nothing.

The third witness is George Railton and whatever he may have proved as affecting the Defendant, is but the Evidence of a single uncorroborated witness ; now, under the Law of Canada (except in commercial matters) the maxim "*unus testis, nullus testis,*" is strictly applicable to a case circumscribed as this is, and, therefore, in our opinion, the Plaintiff ought to have been non suited at the trial.

He, Railton, however, swears, that he said to Mr. Gilmour, words to this effect " If the young man likes the girl, why don't he marry her ?" upon which Gilmour remarked with relation to the girl's character, that it would break his mother's heart, (that is Mrs. Patton's heart,) " he did use the word "whore," this conversation took place in Mr. Gilmour's office, it was in Mr. Gilmour's private office." " I do not think there was any other person present." Now, I ask, how can malice be inferred from this ? the occasion naturally gave rise to the conversation between Gilmour and Railton, who was then in his service, and was occasioned by the fact

of Patton having absented himself from his duties to cohabit with the Plaintiff ; had he been actuated by malice towards the Plaintiff, or a wish to slander her, he would have done so openly, and upon other and different occasions, than when speaking with his confidential clerk, and in his private office, with respect to the cause of Patton's absence ; even if the words said to have been spoken were most distinctly proved to have been so spoken at the time, yet having been spoken confidentially with respect to Patton's absence from his duty, all idea of malice is wanting.

We are satisfied that the Jury ought not to have rendered the verdict which they have given, and it may not be unworthy of remark, that though it was proved, not only by Railton, that the words spoken, whatever they may have been, were said in the autumn of 1852, and although the Plaintiff was heard before the Jury on oath, as legally she might be (1) and proved the time when she acquired the knowledge of the alleged slander, yet the Jury in answer to one of the questions submitted, and which they were bound on their oaths to answer, namely, when did the knowledge of the words spoken reach the ears of the Plaintiff, answer—"we cannot say" again they find the Plaintiff's character "good" notwithstanding rumors to the contrary proved by Patton.

Upon the whole of the case, and without further enlarging upon it, we are of opinion, not that a non suit cannot now be entered, that would have been properly done at the trial, but that the Plaintiff take nothing by her motion for judgment pursuant to the verdict, and we further order that the said verdict be quashed, annulled and set aside, and the action of the Plaintiff dismissed, with costs to the Defendant.

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(1) 2 Dureau, p. 382.

**BADGLEY, Justice :** I concur in the judgment in this case. In all cases of this kind there ought to be sufficient proof by two witnesses of the alleged slander; and as in this case sufficient proof has not been adduced before the Jury, we must not maintain the verdict. The only testimony of the use of the word "whore" by the Defendant, is that of Mr. Railton, a clerk in the employ of the Defendant, and this arose in the course of a conversation occasioned by the absence of Patton then the clerk of the Defendant. The other witness is Patton, who merely swears that the Defendant used the words, "that the Plaintiff had been frequently seen in the company of a gentleman." Now in cases of libel this cannot be considered corroborative testimony. (1) The communication between master and servant is privileged. The opprobrious term, is only proved by one witness, and none speak positively as to the precise date.

**MEREDITH, Justice, dissenting :** The principal point in this case is as to whether there is sufficient evidence to support the Verdict of the Jury. Although according to our law a single witness is not sufficient to prove a fact not of a commercial nature, yet the direct evidence of one witness may be enough, if corroborated by circumstances. (2)

The majority of the Court are of opinion in this case that the testimony of Mr. Railton was not corroborated, so as to justify the Jury in making it the basis of their Verdict. The case in my opinion, turns on this point, and it is one which has presented much difficulty to my mind; but after giving it the most careful consideration, it appears to me that the Jury may properly have thought that the evidence of Railton was confirmed by that of Patton. It is true that the witness

(1) Vide 4 L. C. Rep. p. 68, the cause of White vs. Steward, there cited:—Dalkeith, p. 50.

(2) 9 Toullier, p. 502, No. 317:—Macfarlane's Practice of the Court of Sessions in Jury cases, p. 227:—Bell's Principles of the Law of Scotland, No. 2267, p. 835.

last named has said but little that can be of advantage to the Plaintiff, but to what he did say favorable to her cause the Jury probably may have attached the greater weight, in consequence of the undisguised hostility of the witness to the Plaintiff. Mr. Railton has sworn that the Defendant made use of the word "whore" in speaking of the Plaintiff; that the Defendant said "she had been kept by a person in Montreal," and that when this was said "a Mr. G's. name was mentioned," the witness says the expression was this, "she was kept by a Mr. G. in Montreal." Mr. Patton (the second witness) speaking of the communication he had with the Defendant in the spring of 1853, says, "I believe "the Defendant said that the Plaintiff in this cause had "boarded a long time at Mrs. P., and that she had been "repeatedly seen in the company of a Mr. G." In weighing this observation, it is necessary to bear in mind that the Mr. G. thus alluded to is the same person mentioned in Mr. Railton's evidence, and with whose name that of the Plaintiff, as appears from the evidence of Patton, had been most unfavorably mentioned; also, that the allusion was made at a time when the marriage of the Plaintiff with Mr. Patton was the subject of conversation between him and the Defendant. The observation made by the Defendant, under the peculiar circumstances to which I have adverted, "that "the Plaintiff had been repeatedly seen in the company of "a Mr. G.," cannot be regarded as a mere unmeaning expression; it certainly had a tendency to cause suspicions in the mind of Mr. Patton, and judging from the verdict, the Jury must have regarded it as corroborating the positive evidence of Railton as to the Defendant having said "that "the Plaintiff had been kept by a Mr. G. at Montreal." The two learned Judges before whom the case was tried must, I think, have entertained this opinion, for otherwise it would have been their duty to instruct the Jury that the evidence of Railton had not been corroborated, and therefore

could not support a verdict for the Plaintiff. (1) It may also be observed that the Jurors, who saw the witnesses and heard them give their evidence had much better opportunities of judging of the value of that evidence than we have, and although the two written depositions may not now bring conviction to our minds, yet the examination of the two witnesses in open Court may have been amply sufficient to satisfy the minds and consciences of the Jury. (2) Upon the whole, bearing in mind that the evidence adduced by the Plaintiff has twice been submitted to Juries as proper for their consideration, and bearing also in mind that this is the second unanimous verdict that has been rendered in favor of the Plaintiff, I do not think I would be justified in setting it aside, as being unsupported by competent evidence.

There is another important point in this case upon which I have the misfortune to differ from the majority of the Court. His Honor the Chief Justice and Mr. Justice Badgley are of opinion, as I understand, that even if the words attributed to the Defendant by Mr. Railton could be considered proved, still that they ought to be deemed a privileged communication. In that opinion I cannot concur. According to my view the finding of the Jury, as to the facts, is binding upon me in this case, and if, as I am bound to suppose from the verdict, the Defendant said that "the Plaintiff had been kept by a gentleman in Montreal," I cannot regard that communication as privileged, because, firstly, it does not appear that the Defendant had any reasonable grounds for believing that statement to be true, (3) and, secondly, because there was no necessity, or even just occasion, for the making of

(1) *Grant on New Trials*, pp. 185, 6.—*Graham on New Trials*, p. 283.

(2) *9 Toullier*, p 521. "L'Autorité des témoins présents, la foi qu'ils méritent, est donc toute autre que celle des témoignages écrits que l'on récite aux "Juges":—3 *Blackstone*, 375 "As much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it."

(3) See Judgment of Chief Justice Tindal and of the other Judges in *Coxhead vs. Richards*, 5 N. Y. Legal Obs., p. 253.

that statement to Mr. Railton who had no interest in knowing the character of the Plaintiff. (1)

The question of malice is involved in the two questions to which I have already adverted. If, as the Jury have found, the Defendant used the words imputed to him, and if, as I think, the occasion did not justify the use of those words, then, although there are no grounds for supposing that the Defendant was actuated by feelings of hostility or ill will towards the Plaintiff, still he is chargeable with legal malice, for that is to be inferred from the doing of a wrongful act, without justification or sufficient excuse. (2)

Having thus explained my views as to the points upon which I believe the judgment of the Court turns, I do not think it necessary, seeing that my opinion is not to prevail, to go further into the case.

I will merely add, and I deem it just to the Defendant to do so, that although I do not think I ought to disturb the verdict of the Jury, still I have grave doubts whether, if I had been one of the Jury, I could have concurred in that verdict; the questions, however, upon which I might have differed from those who have acted as Jurors in this case, are questions of fact which are particularly within the province of the Jury, and although I may not be prepared to draw the same inference that appears to have been drawn by the jurors from the evidence bearing upon these questions of fact, yet that would not in law authorize me to set aside their verdict.

Judgment : The Court, &c. : Having heard the parties, by their Counsel, respectively, as well upon the rule of the twentieth day of November last, granted to the said John

(1) Starkie on Slander. Preliminary Discourse, pp. 84, 85.

(2) I Starkie on Slander, p. 213:—Smith's Rep., Dunn vs. Hall:—also, Judgment of Mr. Justice Bailey in Bromage vs. Prosser, 4 B. & C. “ and if I traduce a man, “ whether I know him or not, and whether I intend to do him an injury or not, I “ apprehend the law considers it as done of malice, because it is wrongful and “ intentional.”

Gilmour, upon his motion that the verdict in the said cause rendered on the eleventh day of October last, be set aside and a non suit entered, or the judgment be arrested, or a new trial be granted, for the reasons in the said motion mentioned, as upon the motion of the twenty-third day of November last, on behalf of the said Plaintiff, for judgment upon the verdict rendered and recorded in the said cause on the eleventh day of October last ; and having heard the parties finally upon the merits of this case, pursuant to the inscription to that end and effect made by the said Plaintiff on the twenty-second day of February last, and maturely deliberated thereon,—it is by the Court now here adjudged, that the said Plaintiff take nothing by her said motion for judgment pursuant to the said verdict : and considering further that the said Plaintiff hath not proved the material allegations in her declaration set forth and contained, doth consider and adjudge that the said verdict be and the same is hereby set aside and annulled, and that the action of the said Plaintiff in this cause be and the same is hereby dismissed with costs ; and the court doth order that each party pay their own costs of the former trial, but without prejudice to the costs heretofore awarded to Messrs. Holt and Irvine, the Plaintiff's Attorneys, *distraits* in their favor, upon the postponement of the trial in September last, at the instance of the Defendant. His Honor Mr. Justice MEREDITH, dissenting, declaring that he was of a contrary opinion.

HOLT and IRVINE, for Plaintiff.

STUART, Okill, for Defendant.

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## SUPERIOR COURT.—MONTREAL.

Before DAY &amp; SMITH, Justices.

No. 2557. { The Honble. Lewis T. DRUMMOND,  
 Attorney General, *pro Regina*... Petitioner,  
 vs.  
 The MUNICIPALITY of the County of  
 Two Mountains..... Defendant,  
 and  
 The Montreal and Bytown RAILWAY  
 COMPANY..... *Intervening Party.*

Held:—1. That under the 16 Vict. c. 138, a By-law of a County Municipality Corporation which authorizes a subscription for shares of stock on a Railway passing through the county, and for the issuing of Debentures to pay for such shares, is void if no provision is made in the By-law for imposing an annual rate or assessment for the payment of interest, and the establishment of a sinking fund;

2. That in passing a By-law without making such provision, the corporation exceeds its powers and exercises franchises and privileges not conferred on it by law;

3. That under the 12th Vict. c. 41, the Superior Court, on petition in the name of the Attorney General, has jurisdiction over corporations, and to set aside such By-law.

Jugé:—1. Que sous la 16e Vict., c. 138, un Règlement d'un Conseil Municipal de Comté qui autorise le maire ou autre personne à prendre et à souscrire des actions dans le capital d'un Railroute passant à travers tel comté, et à émaner des Débentures pour le paiement de telles actions, est nul si par tel Règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement;

2. Qu'en passant un Règlement sans faire telle provision, la corporation excède ses pouvoirs et exerce une franchise et des priviléges qui ne lui ont pas été conférés par la loi;

3. Que sous la 12e Vict., c. 41, la Cour Supérieure, sur requête au nom du Procureur Général, a jurisdiction sur les corporations, et peut déclarer nul tel Règlement.

Judgment rendered the 30th April, 1855.

This was a petition, *requête libellée*, in the name of the Attorney General for Lower Canada, under the eighth section of the 12th Vic. Cap. 41, quoted below, to quash and set aside a By-law of the Municipality of the County of Two Mountains; the petition set forth, in effect, the provisions of the first and sixth sections of the Act 16th Vic. Cap. 138, intituled, “An Act to empower the Municipalities of the “Counties of Two Mountains, Terrebonne, Rouville and “Missisquoi, to take stock in any Railroad Companies, for “the construction of Railways passing through the said “counties respectively, and to issue Bonds for the payment

" of the same," also, the provisions of another Act, (1) extending the provisions of the former Act to all County, Town and Village Municipalities, and providing for the mode of ascertaining the approval of the majority of qualified electors of each Town or Village. The petition also set forth, at length, the terms of the By-law passed at a quarterly meeting of the Council, held on the eighteenth of August, 1853, and proposed for the approval of the voters, which By-law is in the following terms :

" Attendu qu'un chemin de fer entre la cité de Montréal et Bytown, qui passera à travers le comté des Deux Montagnes, passant par les paroisses de Saint Augustin, Sainte Scholastique et St. Hermas, et ayant des dépôts aux divers villages où il passera, avancera la prospérité et les intérêts agricoles et commerciaux de ce comté, et ajoutera à la valeur de la propriété foncière en icelui, et qu'il est de l'intérêt de ce comté d'aider à l'établissement et à la confection d'un tel chemin."

" A une séance spéciale du conseil municipal du comté des Deux Montagnes, tenue à Saint Benoit, ce seizième jour d'Août, de l'année mil huit cent cinquante-trois, en vertu de l'acte de la législature provinciale, 14 et 15 Vict. chap. 98, de la manière voulue, et suivant les formalités prescrites par le dit Acte, à laquelle dite assemblée étaient présents un quorum du dit conseil :"

" Il est ordonné et statué, et le dit conseil par les présentes ordonne et statue, sujet au consentement de la majorité des électeurs qualifiés du comté des Deux Montagnes, préalablement obtenu de la manière stipulée et pourvue dans et par l'acte 16 Vic. chap. 138."

Section 1. Aux conditions et termes ci-après stipulés et pourvus, le maire de la dite municipalité sera, et il est par le

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(1) 16th Vict. Chap. 213.

présent autorisé et requis, par et de la part de la dite municipalité de ce comté, à souscrire et prendre deux mille actions dans le fonds social de la compagnie du chemin de fer de Montréal et de Bytown, incorporée par Acte du parlement de cette province.

**Section 2.** Que le maire et le conseil du dit comté sont par le présent autorisés à emprunter la somme de soixante-et-deux mille livres cours actuel, pour payer les actions ainsi souscrites dans le dit fonds social de la dite compagnie du dit chemin de fer de Montréal et de Bytown, *et l'intérêt d'icelles*, jusqu'à concurrence de la balance, après payement des dites actions, selon que les sommes à payer deviendront dues de temps en temps, par versements ou autrement, au fur et à mesure que la construction et les travaux du dit chemin avanceront. Les dits maire et conseil du dit comté seront et sont par ces présentes autorisés et requis, de temps à autre, et aussi souvent qu'il sera nécessaire, d'émettre et vendre des bons ou débentures de la dite municipalité du dit comté des Deux Montagnes, signés par le maire du dit comté, et contre-signés par le secrétaire-trésorier d'icelui, pour une somme, ou des sommes, n'excédant pas en tout, mais n'étant pas moins que la somme de soixante-et-deux mille livres cours actuel, les dits bons et débentures devant porter intérêt à six pour cent par année, payables semi-annuellement, et ne pouvant être remboursables avant vingt-cinq ans au moins de leur date, et ne devant être émanés que pour des sommes qui ne seront pas au-dessous de cent livres courant chaque.

**Section 3.** Que les dits maire et conseil ne seront autorisés à emprunter de l'argent, ou à émettre des bons ou débentures de la dite municipalité à cet effet, de la manière pourvue dans et par les deux sections précédentes de ce règlement, qu'aux termes et conditions ci-après exprimés, savoir :

1o. Que le montant total du capital social soit préalablement souscrit et pris par des actionnaires responsables et de bonne foi.

20. Qu'un contrat, ou des contrats *bond side* soient passés pour la construction de tout le chemin de Montréal à Bytown.

30. Qu'un embranchement sur le principe du chemin de fer de Rawdon et de l'Industrie sera fait du tronc principal à Lachute.

40. Que le conseil du dit comté ne sera pas appelé à payer ou à contribuer pour ou en compte du capital à souscrire, en vertu de ce règlement, si ce n'est en proportion et au *pro rata* des autres actionnaires. Et que le capital à souscrire en vertu de ce règlement, sera payable, à l'option du conseil de ce comté, soit en argent, soit en bons ou débentures de la municipalité à émettre en vertu de ce règlement ; lesquels bons ou débentures, s'ils sont offerts en payment du dit capital, seront dans tous les cas reçus au paire.

50. Que ni dans le cas où il sera nécessaire, en aucun temps à venir, d'augmenter le fonds capital de la dite compagnie de chemin de fer de Montréal et de Bytown, ni dans aucun autre cas quelconque, aucun privilége, préférence ou avantage ne sera accordé ou donné à aucun capital nouveau ou additionnel sur le capital souscrit ou possédé, et aucun privilége, préférence ou avantage ne sera accordé ou donné aux souscripteurs ou possesseurs du dit capital nouveau ou additionnel, en préférence ou au préjudice de la dite municipalité."

The By-law referred to in the petition dated the 12th October, 1853, ratifying the By-law proposed for the approval of the voters, contains a declaration, that it appeared by the papers and documents submitted to the Council, that all the formalities required by the Statute had been complied with, and a valuation made of the immoveable property in the country, in the year 1852, and that the votes in favor of the By-law were 2091 ; against it 1210 ; majority 881. The enacting part of the By-law is in the following terms : " Il

" est par ces présentes statué, ordonné et réglé ; Que ce conseil a ratifié, confirmé et adopté, et par ces présentes ratifie, confirme et adopte le dit règlement du seize Août dernier."

The grounds on which it is alleged that the Council had offended against the provisions of the Act, creating the corporation, and had exceeded the powers and exercised franchises and privileges not conferred by law, are in the petition, in effect, alleged to be as follows :

1. In attempting to authorize the issue of debentures to the extent of £62,000, while the subscription of 2000 shares of stock referred to in the By-law was only to the extent of £50,000, the shares being of £25 each.
2. Because no valuation of rateable property of the county had been made within the five years mentioned in the Act first referred to, and particularly that no valuation whatever had been made in and for the parish of St. Columban.
3. Because, although the village of St. Eustache, was a duly incorporated town or village within the municipality, no voting had taken place there, and none of the requirements of the Act complied with, as respects the votes of that town or village.
4. Because no special rate or assessment, as required by the Statute first referred to, was provided for under the By-law, to secure the payment annually of the interest on the debentures proposed to be issued, and the establishing a sinking fund, and that in consequence thereof the By-law was null and void.

The Defendants pleaded an exception to the jurisdiction which was dismissed.

Also an exception to the form which was afterwards withdrawn, and a *defense au fonds en fait*.

The evidence of record consists of admissions of the signature of the Secretary-Treasurer to the copies of the By-laws filed in the cause, and also to certain documents shewing the votes and population of the several parishes within the Municipality. There was also an admission that under the By-laws referred to, the Mayor of the Municipality had subscribed for stock in the Montreal and Bytown Railway to the extent of fifty thousand pounds currency, and that no Debentures had been issued by the Municipality.

On the 14th February, 1855, an intervention was filed by the Montreal and Bytown Railway Company, in which it is alleged that the Mayor had, under the By-law, subscribed for 2000 shares of the Company's Stock—that on the faith of such subscription amongst others, the Company had entered into a contract with Messrs. James Sykes & Co., to complete the whole road from Montreal to Bytown, and also, a branch road to Lachute on the principle of the Rawdon and Industry Railroad, and had procured the whole of the Company's Stock to be subscribed by *bond fide* and responsible Stock Holders, and had complied with all the conditions of the subscription. That the Municipality had failed to pay two calls of ten per cent each, on the Shares so subscribed for,—that having an interest in supporting the By-laws referred to, the Company "had a right to be notified by the Plaintiff of "the present *requête libellée*, and to be made parties thereto," and to intervene and support the By-law ; that the proceedings of the Petitioner were illegal and void, for the following reasons, which are the same as those set forth in the *exception à la forme* filed by the Defendants.

1. Because the writ does not require the Defendants to answer the *requête libellée*, previously presented to the Court, as by law it should have done, but on the contrary requires the Defendants to answer a certain other *requête libellée* to the said writ annexed.

2. Because the writ was issued without any legal order or authority, and contrary to the Statute. (1)

The intervention then alleges that by collusion with the *Requérant*, and with a view to deprive the *Intervenants* of the said subscription of Stock, the municipality had passed a By-law ordering the *exception à la forme* to be withdrawn, and that the *Intervenants* had "an interest to intervene in "this cause, and maintain the said exception, because they "say, that in the event of the said *requête libellée* being dis- "missed upon the said exception, under and by virtue "of the Statutes in such case made and provided, the said "By-law could not be in any manner attacked, controverted "or objected to, by any proceeding of any kind or nature "whatsoever."

Then follows an allegation that all the proceedings preliminary to the enacting of the By-law were valid, and that all the allegations of the *requête libellée* were unfounded in fact, and insufficient in law. The conclusions are in the following terms: "Wherefore, the said Petitioners pray that they may be permitted to intervene in this cause for the purpose of contesting the said *requête libellée*, both as to the form and sufficiency thereof, and of the Writ of Summons thereunto annexed, and also as to the merits of the said *requête libellée*, and to that end that they be permitted to support and maintain the said exception *à la forme*, and each and every the conclusions thereof, and to urge the nullity of the proceedings in this cause, and the sufficiency and legality of the said By-

(1) Judgment 23rd December, 1853.

Before DAY, SMITH and MONDELET, Justices.

"The Court having seen and examined the petition and *requête libellée* presented and filed before the Court, by the said Attorney General this day, and the documents and affidavits in support thereof, it is ordered that a writ do issue, commanding the Corporation of the said Municipality of the County of Two Mountains to be summoned to appear before this Court on the 17th February next, to answer such declaration, *requête libellée*, to be served." On the writ is indorsed "writ issued by order of the said Superior Court, this 23rd December, 1853." The writ commands the Defendants to appear to answer "the demand contained in the annexed declaration or petition, *requête libellée*," the affidavit of service was to the effect that copies of the writ and of the petition thereto annexed had been served, &c.

law, and that for the reasons aforesaid the said *requête libellée*, and the Writ of Summons thereto annexed, be declared null, illegal and void, and the whole dismissed, *quant à présent*, with costs. The said Petitioners hereby reserving to themselves to take such further conclusions in the matter as they may be advised. The whole with costs.

On this intervention being filed, the Defendants prayed *Acte* that they did not admit nor contest the merits of the petition but submitted the case to the Court, *s'en rapportent à justice*. The Petitioner pleaded to the intervention, by a *défense au fonds en droit* upon various grounds, which were, in effect, that the Company had no right to be notified of the proceeding, and had no right or interest to intervene or to invoke nullities in the original proceedings, or to support an exception already disposed of, that the petition was a summary proceeding, and that the company could not by an alleged breach of contract, on the part of the municipality, impede the proceedings taken by the Petitioner, or engraft other and merely collateral issues thereon ; but were bound to take such proceedings against the municipality as might be warranted by the allegations of fact and circumstances set forth, that the intervention was manifestly unfounded in law from the allegations contained therein.

The judgment is in the following terms :

" The Court having heard the parties by their Counsel upon the *défense au fonds en droit* of the said Petitioner, to the intervention in this cause filed by the said intervening parties ; having seen and examined the said intervention and pleadings in this cause, and having deliberated ; considering that the said Montreal and Bytown Railway Company have failed to allege, by the petition in intervention in this cause filed, any sufficient interest by reason whereof, and by law, they ought to be permitted to intervene in the said cause for the purposes in the said petition, and the conclusions thereof, set forth, main-

taining the *défense en droit* of the Attorney General, *pro Regina*, doth dismiss the said petition in intervention with costs ; and the Court having also heard the parties by their Counsel upon the merits of the petition, *requête libellée*, in this cause made and filed ; having examined the proceedings, By-law, and proof of record, seen the declaration made by the Defendants that they do not admit or contest the merits of the said petition ; and, *s'en rapportent à justice*, and having deliberated thereon ; considering that the material allegations of the said petition, *requête libellée*, have been established by legal evidence, and that the said municipality hath neglected and failed, in the said By-law, to provide for or impose any special rate or assessment upon the rateable property within the said municipality, for such sum of money as may be necessary to meet the interest annually upon the sum intended to be borrowed under and by virtue of the said By-law, and to establish a sinking fund for the payment of the same, and that the said municipality, by enacting and passing the said By-law without such provision being thereon made and contained, hath exercised a franchise and privilege not conferred by law on the said municipality, and hath exceeded its powers and franchises, by reason whereof, and by law, the said By-law is illegal and void, and ought so to be declared, doth adjudge and declare the said By-law illegal, void and of no effect, and to all intents and purposes whatever doth set aside and annul the same, the whole with costs." (1)

**MCLEOD**, for Petitioner.

**LAFLAMME, R. & G.** for Defendant.

**ABBOTT, J. J. C.** for Intervening parties

(1) Extracts from Statutes referred to.

12 Victoria Cap. 41, Section 8. And be it enacted, That ..... whenever "any such Corporation, Public Body or Board shall offend against any of the provisions of the Act, or Acts, creating, altering, renewing or reorganizing such Corporation, Public Body or Board, or shall violate the provisions of Law in such manner as to forfeit its charter by mis-user..... and whenever such Corporation, Public Body or Board, shall exercise any franchise or privilege not conferred on it by law, it shall be the duty of Her Majesty's Attorney General in and for

**SUPERIOR COURT.—QUEBEC.**

**Before BOWEN, Chief-Justice, MEREDITH and MORIN,  
Justices.**

Held:—That where the delay of twenty-five days, allowed by law for the service of the copy of a petition and notice of appeal from the Circuit Court, expires on a legal holiday, the service thereof may be made on the day following.

That it is no valid objection, that service of a copy of the petition and notice of appeal has not been made upon the Clerk of the Circuit Court, and that in consequence of such omission an appeal cannot be dismissed, nor that the copy of the petition and notice of appeal served upon the Attorney of the Respondent, bears date previously to the rendering of the judgment appealed from.

Jujé:—Que lorsque le délai de vingt-cinq jours, accordé par la loi pour la signification de copie d'une requête et d'un avis d'appel de la Cour de Circuit, expire un jour de fête, telle signification peut être faite le jour suivant.

Que le défaut de service de copie de la requête et de l'avis d'appel sur le Greffier de la Cour de Circuit, n'est pas une cause suffisante pour faire renvoyer l'appel, et que quoique la copie de la requête en appel et de l'avis d'icelle servie sur le Procureur de l'Intimé, soient datés avant la reddition du jugement dont est appel, néanmoins ce n'est pas non plus une cause suffisante pour faire renvoyer l'appel.

Judgment rendered the 7th May, 1855.

This case was heard upon a motion to dismiss an appeal from a judgment rendered in the Circuit Court, for the Quebec Circuit, on the 24th March, 1855.

"Lower Canada, for the time being, whenever he shall have good reason to believe that th- same can be established by proof, in every case of public interest ;"—and also in every other case in which satisfactory security shall be given..... "to apply for and on behalf of Her Majesty to the Superior Court, or two or more Judges of such Court in vacation, &c , by an information, declaration or petition, *requête libellée*, praying for such order or Judgment as may be authorized by law, whereupon it shall be lawful for such Court, or for such Judges, to order the issue of a writ, &c , &c."

16 Victoria Cap. 138, Section 1. And it is hereby declared and enacted, "That it shall be lawful for each of the said Councils, by a By-law to be passed either at one of their Quarterly Sittings or at any meeting by them regularly held, to authorize the Mayor or Chief Officer, or any other person whom they may specially appoint for that purpose, to take and subscribe for Shares in the Capital Stock of any Railroad Company or Companies, now or hereafter to be incorporated for the construction of any Railway or Railways, running through the said Counties respectively, to an amount not exceeding one hundred thousand pounds currency, for each Municipality, and to authorize the necessary funds for the payment of the said stock to be borrowed upon the credit of their Municipality, and to provide for and impose a special rate and assessment over and above any rate and assessment, which such Council is now by law authorized to make upon the rateable property within such Municipality, for such sum or sums of money as may be necessary to meet the interest annually upon any money

The grounds upon which the motion was founded, are in substance as follows :

Because the petition in appeal, notice and bail-bond filed in the cause, were served upon a legal holiday, made such by Proclamation of the Governor General, and that such service is therefore null and void.

Because no copy of the petition in appeal, with the notice of the time at which it was to be presented to the Superior Court, was legally served on the adverse party personally or at his domicile, or on his Attorney *ad litem*, within twenty-five days from the rendering of the judgment appealed from.

Because the Appellant did not, within the same delay of twenty-five days after the rendering of the judgment appealed from, cause a copy of the said petition and notice to be served

" which they may borrow for the payment of the said shares in the said Capital Stock, and also to establish a Sinking Fund to provide for the liquidation of the capital of the money which may be so borrowed by their Municipality."

Section II. Provided always, and be it enacted, " That no By-law shall be passed by either of the said Councils authorizing such subscription as aforesaid, until after it shall have been approved by a majority of the qualified electors of each County." The mode of approval is then provided for.

Section III. enacts: "That it shall not be lawful to adopt any of the proceedings above referred to, unless there shall have been made within the five years next preceding, by the assessor or other proper persons, a valuation of the rateable immovable property of the inhabitants of the municipality."

Section IV. And be it enacted, " That so soon as a By-law shall have been passed by the Council of either of the said municipalities as mentioned in the foregoing sections, the Mayor, or other person thereby authorized may, on behalf of such municipality, subscribe, &c."

Section V. Certificate of Secretary to have the effect of By-law, in certain cases.

Section VI And be it enacted, " That a special rate and assessment shall, under the authority of every By-law to be passed as aforesaid, be raised, levied and collected annually ..... and shall be in amount sufficient to pay the interest annually of the bonds or debentures issued by the municipality under this Act, and at least two per cent additional on the entire amount of the capital of the said bonds or debentures in each year, after deduction of all charges and expenses, for the purpose of establishing a sinking fund to redeem the capital of the said bonds or debentures."

Section VII. Provides mode of levying monies by execution.

Section VIII. And be it enacted, " That no such By-law of either of said municipalities, as is mentioned in the first section of this Act, shall be repealed, until the said debt and interest shall have been entirely paid, cancelled and discharged, and any proceedings for the repeal of any such By law, until the complete payment of such debt shall have been made, shall be absolutely null and void."

upon the clerk in whose office and custody the record appealed from remained.

Because the paper writing purporting to be a copy of the said petition, and a copy of the said notice, and each of them, bore date previous to, and before the rendering of the judgment appealed from.

It was contended in shewing cause against the motion, that the delay of twenty-five days having expired on a holiday, the service was legally effected on the day following, according to the provisions of the 12 Vict. c. 57, s. 90.

That the holiday in question was a holiday appointed by proclamation of the Governor as a day of fast and humiliation in consequence of the war, and could not therefore have been foreseen. That no less than three services had been made in the present case. The first had been made on the day preceding the holiday, but by the error of the bailiff the original petition and notice had been left with the Respondent's attorney, who, on the same day, after the error was discovered, refused to return them ; that a second service was effected upon the same party on the holiday, and as further precaution, another copy of the petition and notice were served upon him the day after the holiday.

That the erroneous date at the bottom of the petition and notice was not a valid objection, as the judgment appealed from was described in the body of the petition and notice, and that even if there had been no date at all it would not have affected the validity of the service ; (1) and that notwithstanding the error, the return of the bailiff established that the service was effected subsequently to the rendering of the judgment appealed from.

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(1) No. 1191, Tétu vs. Martin, Superior Court, Judgment rendered the 19th April, 1853.

That as to the objection that no service had been made upon the clerk of the Court, the only object of such a formality being to compel him to produce the record, and inasmuch as the clerk had produced the record, the objection could not be maintained.

Judgment :—The Court having seen and examined &c. Considering that as the twenty-fifth day, from the day of the rendering of the judgment complained of by the Appellant, was a holiday, the service of the copy of the petition and of the notice, mentioned in the said rule, could legally be made on the twenty-sixth day from the day of the rendering of the said judgment, and seeing that the service of the said copy of petition, and of the said notice, was made on the said twenty-sixth day from the day of the rendering of the said judgment, and that the said Respondent hath not shewn any sufficient cause for the rejection of the said appeal,—it is in consequence ordered that the said rule of the said Respondent be, and the same is hereby discharged.

**JONES**, for Appellant.

**AUSTIN**, for Respondent.

#### SUPERIOR COURT.—MONTREAL.

Before **SMITH, VANFELSON and MONDELET**, Justices.

|          |                                                                 |
|----------|-----------------------------------------------------------------|
| No. 510. | { DUBOIS, ..... Plaintiff,<br>vs.<br>{ DUBOIS, ..... Defendant. |
|----------|-----------------------------------------------------------------|

|                                                                                                                                      |                                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| Held :—That notice of motion received by one of two Attorneys, after the elevation of a previous partner to the Bench is sufficient. | Jugé :—Qu'avis de motion donné à l'un de deux Procureurs associés, l'autre ayant été promu au Banc est suffisant. |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|

Judgment rendered the 27th March, 1855.

On the notice of motion for *Peremption d'Instance*, was written “*Reçu avis sauf objection résultant de ce que depuis*

"les derniers procédés l'un des procureurs du demandeur a été nommé Juge-en-Chef de la Cour du Banc de la Reine," notice held sufficient, and action dismissed.

**BERTHELOT**, for Plaintiff.

**CHERRIER and DORION**, for Defendant.

**BANC DE LA REINE,** { **DISTRICT DE MONTREAL.**  
EN APPEL.

Présents : Sir L. H. **LA FONTAINE**, Bart., Juge-en-Chef,  
**AYLWIN, DUVAL et CARON**, Juges.

{ **MERCURE**, ..... *Appelant*,  
et  
{ **LA FRAMBOISE, et al.** ..... *Intimés*.

**Jugé** :—1. Qu'il y a lieu à la contrainte par corps par *Capias ad Satisfaciendum* pour refus des portes, par un débiteur, à l'huissier chargé d'un bref d'exécution contre lui.

2. Que dans l'espèce la preuve résultant des rapports de l'huissier chargé d'exécuter est suffisante pour justifier la contrainte.

3. Qu'il y a droit d'appel du jugement ordonnant la contrainte par corps dans ce cas, de même que de tout autre jugement dont l'appel est accordé par la loi.

**Held** :—1. That a *contrainte par corps* by *Capias ad Satisfaciendum* may issue, against a debtor refusing to open his door to the bailiff charged with a writ of execution against him.

2. That in the case submitted the returns of the bailiff are sufficient proof to justify the issuing of such *Capias*.

3. That an appeal lies from the judgment awarding such *contrainte par corps*, in like manner as from any other judgment whereof an appeal is granted by law.

Jugement rendu le 12 Mars, 1855.

Cet appel mettait en question le droit de contrainte par corps contre un débiteur, pour refus des portes à l'huissier chargé d'un Bref d'exécution contre lui.

Les Intimés ayant obtenu en la Cour de Circuit de Montréal, le 31 Décembre, 1850, jugement contre l'Appelant pour £22 17 2½, outre les intérêts et frais de poursuite, obtinrent un Bref d'exécution contre l'Appelant pour en effectuer le recouvrement. L'Huissier chargé de ce Bref fit un premier rapport dont suit la teneur :

“Je, Dominique Dupont, un des huissiers jurés de la Cour Supérieure du Bas Canada, dans et pour le District de Montréal, certifie, que le 24e jour de Février, 1851, à deux heures de l’après-midi, je me suis transporté au domicile du Défendeur en cette cause, étant accompagné de mes recors soussignés, Louis Guérin, huissier, résidant en la Cité de Montréal, et Edouard Porteous, gentilhomme, du même lieu, pour mettre à exécution un warrant de *fieri facias*, contre les meubles, émané en cette cause contre le dit Défendeur, et que là étant, j’ai frappé à sa porte à différentes reprises, et j’ai sonné la cloche de l’entrée par plusieurs fois, et le dit Défendeur du haut de sa fenêtre s’est refusé de nous ouvrir ses portes après l’avoir requis de le faire, et même avoir dit à un de mes recors qu’il ne nous ouvrirait point, qu’on vint à prendre les formalités qu’ils nous plairaient de prendre pour nous les faire ouvrir, et qu’en conséquence il m’a été impossible de procéder à la saisie. C’est pourquoi, j’ai dressé le présent retour pour servir et valoir ce que de droit. Montréal, 24 Février, 1851.

(Signé) D. DUPONT, H. C. S.

(Signé) LOUIS GUERIN, } Recors.  
E. PORTEOUS.

Le lendemain 25 Février, 1851, l’huissier fit un second rapport dans les termes suivants :

“Je, Dominique Dupont, un des huissiers jurés de la Cour Supérieure du Bas Canada, dans et pour le District de Montréal, certifie, que le 25e jour de Février, 1851, à quatre heures de l’après-midi, je me suis transporté au domicile du Défendeur en cette cause, en la Cité de Montréal, étant accompagné de mes recors soussignés, Emilan Mackay, huissier, et Edouard Porteous, gentilhomme, tous deux de la Cité de Montréal, dit District, pour mettre à exécution un warrant de *fieri facias*, contre les meubles, émané en cette cause contre le dit Défendeur, et étant arrivé à la porte du domicile du dit

Défendeur, nous l'avons trouvé sortant de sa maison, et alors je lui ai dit, en présence de mes recors soussignés, que j'avais en mains un warrant de *fieri facias*, contre les meubles, émané contre lui, et qu'en conséquence il vint à m'ouvrir ses portes pour le mettre à exécution ; le dit Défendeur m'a fait réponse, après l'avoir sommé au nom de la loi de me les ouvrir, qu'il n'ouvrirait pas, et alors je lui ai dit que j'allais prendre les formalités de droit, il dit que je pouvais prendre les formalités qu'il me plairait de prendre, que quant à lui il ne consentirait point à me les ouvrir. C'est pourquoi j'ai dressé le présent retour pour servir et valoir ce que de droit. Montréal, 25 Février, 1851.

(Signé) D. DUPONT, H. C. S.

(Signé) EMILAN MACKAY, { Recors.  
E. PORTEOUS.

Le 28 Février les Intimés obtiennent la règle *Nisi* suivante :

" It is ordered on motion of Mr. Lafrenaye, of Counsel for the said Plaintiffs, that inasmuch as it appears by the return of Dominique Dupont, one of the sworn bailiffs of the Superior Court, for the District of Montreal, to the writ of *Fieri Facias de Bonis* in this cause issued, against the goods and chattels of the said Defendant, that on the 24th day of February instant, at the hour of two of the clock in the afternoon, the said bailiff then and there charged with the execution of the said writ, proceeded to the domicile of the said Defendant, in the City of Montreal, according to law, to put in execution the said writ, and to seize and take in execution, by virtue of the said writ, the goods and chattels of the said Defendant, where being and finding the doors of the said domicile locked, in order to prevent admission thereto, he the said bailiff demanded of the said Defendant to open the doors of his said domicile, and to permit him the said bailiff to enter therein in order to effect the seizure of the said goods, but could not

effect the seizure of the same, and was prevented and stopped from so doing, and was then and there opposed from so doing by the said Defendant himself in person, who then and there positively refused to open his doors, and by then and there shutting up his house, and who then and there persisted in his said refusal; and that afterwards to wit: on the 25th day of February instant, at the hour of four of the clock in the afternoon, the said bailiff charged with the execution of the said writ, again proceeded to the said domicile for the purpose of seizing and taking in execution the goods and chattels of the said Defendant, but could not effect the seizure of the same, and was then and there prevented from so doing by the said Defendant himself in person, who then and there opposed the seizure thereof by shutting up his house, and refusing admittance thereto to the said bailiff, and did then and there refuse to open his door, although repeatedly requested so to do, as the whole more fully appears by the said return:—an execution do go against the person of the said Defendant to be taken and detained in prison, to wit: in the common gaol of this District of Montreal, until he satisfies the judgment in this cause rendered, in principal interest and costs of these presents, unless cause to the contrary be by him shewn on the twenty fourth day of March next, at ten of the clock in the forenoon, sitting the Court.”

Le 24 Mars, l'Appelant comparut par procureur, et la cause fut remise au 26 pour audition sur la règle. Le 26 les parties furent entendues sur la règle, et le 31 Mars intervint le jugement qui suit :

“ The Court having heard the parties by their Counsel upon the rule obtained by the Plaintiffs against the Defendant, on the 28th day of February, 1851, having examined the proceedings, and having deliberated thereon, considering that the Defendant has not shewn sufficient and valid cause why the conclusions of the said rule should not be granted, doth

declare the said rule absolute, and in consequence doth order that a writ of *contrainte par corps*, do issue against the person of the Defendant, to be taken and him detained in the common gaol of the District of Montreal, until he, the said Defendant, shall have satisfied the judgment in this cause rendered, in principal interest and costs, and the costs of the said rule to which the said Defendant is hereby condemned.

Mercure se pourvut contre ce jugement devant la Cour Supérieure à Montréal, qui, le 17 Juin, 1851, prononça comme suit :

The Court having heard the parties by their Counsel upon the merits of the appeal in this cause, having examined the Record and proceedings in this cause, and having deliberated, considering that by law no right of appeal is created, or subsists, from a judgment of a Circuit Court, awarding execution against the person of the Appellant for having opposed the seizure and taking in execution of his goods and chattels, by shutting his doors, doth dismiss the said appeal, but without costs. (Mr. Justice DAY, dissenting.)

Mercure en appela enfin à la Cour du Banc de la Reine. Les raisons par lui données contre le jugement de la Cour de Circuit sont : 1o. Que le jugement a été rendu sans enquête, de manière à le mettre en état par des transquestions de repousser les imputations faites contre lui ; 2o. Qu'il n'y a pas de preuve légale suffisante pour appuyer la sentence portée contre lui ; 3o. Que le jugement ne contient pas la mention de la somme fixe qu'aura à payer l'Appelant ; 4o. Que la règle a été émanée sans avis préalable à lui donné ; 5o. Qu'il ne pouvait être emprisonné pour dette, sous la 12e Vic. c. 42. Et quant au jugement de la Cour Supérieure, l'Appelant en demandait l'annulation, le jugement de la Cour de Circuit étant susceptible d'appel, et aucune disposition législative ne le privant de ce recours. (!)

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(1) Autorités citées par l'Appelant : 12me Vic. c. 42, seca. 1 et 15 :—18me Vic. c. 12 :—Russell vs. Wright, jugée à Montréal.

Les *intimés* soutinrent le bien jugé, tant de la Cour de Circuit que de la Cour Supérieure. (1)

Sir L. H. LAFONTAINE, Baronet, Juge-en-Chef : La question soulevée et traitée par les parties comme étant la principale question en cette instance, est celle de savoir si la *contrainte par corps* que la 37e section de l'ordonnance de 1785, permettait de faire émaner contre un débiteur, dans les cas prévus par cette section, a été abolie par l'acte provincial de 1849. (2)

Cette section de l'Ordonnance porte que "dans tous procès, " tant ceux au-dessus qu'au-dessous de £10 sterling, où le " Défendeur divertirait ou séquestrerait ses meubles ; ou, que, " par violence, ou en fermant sa maison, son magasin, ou " boutique, il s'oppose à la saisie de ses effets ; dans tous " tels cas (3) il sera décerné contre lui une prise de corps, et " il sera appréhendé et détenu en prison jusqu'à ce qu'il ait " satisfait au jugement."

Dans l'acte de 1849, intitulé : " Acte pour abolir *l'emprisonnement pour dette*, et punir les débiteurs *frauduleux* dans le Bas Canada, et pour d'autres objets," il est dit à la fin de la 1ère section : " Aucun Writ de *Capias ad Satisficiendum*, " ou autre exécution contre la personne, ne sera décerné ni " accordé après la passation de cet acte." De ces mots, Mercure, l'Appelant, argue l'abrogation de la 37e section de l'ordonnance 1785.

Il me semble que le titre et le préambule seuls du statut de 1849, sans considérer pour le moment les autres parties de cette loi, annoncent clairement que l'emprisonnement,

(1) Autorités des *Intimés* : *Gugy vs. Kerr*, jugée à Québec :—*Dickeson vs. Fletcher, Stuart's Report*, pp. 276, 288 :—12me Vic. c. 38, sec. 64, 53 :—*Jousse, Ord. de 1667, Art 5, Tit. 33* :—*Henth vs. Drolet*, No. 387, jugée le 17 Mai, 1844 :—*Lebasuf vs. McCulloch*, jugée en 1851, à Québec.

(2) 12 Vic. c. 42.

(3) Les mots, "on due proof thercof," dans l'anglais, sont omis dans le français.

dont l'exemption, pleine et entière pour certaines personnes, dans tous les cas de dette ou autre cause d'action civile, (sauf l'exception apportée par la 15e section du statut) et pour d'autres, soumise à certaines conditions, fait l'objet de la loi, n'est autre que l'emprisonnement pour dette proprement dit ; c'est-à-dire, ce droit du créancier, dans certaines conditions voulues, et sans que son débiteur se soit rendu coupable de *résistance* à exécution de jugement sur ses biens, d'arrêter et emprisonner ce même débiteur, comme moyen d'assurer, autant que possible, le paiement de sa créance, droit inhérent en quelque sorte à la nature de cette créance, et co-existant avec elle, en vertu, selon le langage du préambule du statut de 1849, "des lois réglant les relations entre les débiteurs et les créanciers ;" lois dont "il est désirable d'adoucir la rigueur," suivant le même langage, "autant que le permettent les intérêts du commerce."

On peut ici remarquer que ces mots " intérêts du commerce," insérés au préambule comme l'un des motifs assignés à la loi, porteraient à penser que le législateur n'a entendu parler que de dettes d'une nature *commerciale*, dettes qui avaient pour ainsi dire jusqu'alors donné au créancier le pouvoir arbitraire d'arrêter et d'emprisonner son débiteur. Ce qui est bien propre à confirmer cette opinion, c'est l'exception apportée par la 15e section du statut ; laquelle section déclare expressément que l'exemption de "l'emprisonnement "pour dette," décrétée par cette loi , "ne profitera pas aux "tuteurs, curateurs, séquestrés, dépositaires, shérifs, coroners, "huissiers, ou autres officiers ayant la charge de deniers "publics, cautions judiciaires, débiteurs du prix de biens ou "effets vendus par autorité de justice par licitation, par le "shérif, par décret ou autrement, ou de dommages résultant "de torts personnels."

Encore, d'après le titre et le préambule de cette loi de 1849, l'exemption de "l'emprisonnement pour dette," ne

doit avoir lieu que “lorsqu'on ne peut imputer aucune fraude au débiteur.” Que l'on remarque, en outre, que, dans cette loi, il n'est fait aucune mention du débiteur qui, *en fermant sa maison*, ou autrement, s'oppose à la saisie de ses effets, dans le cas prévu par l'ordonnance de 1785.

Ainsi, de ce qui précède, il me semble qu'il faut nécessairement conclure que le législateur n'a pas voulu, et n'a pas même pu vouloir, surtout d'après les motifs assignés à la loi, accorder le bénéfice de cette loi au débiteur qui, comme l'Appelant, *en fermant ses portes*, et par là, “s'opposant à la saisie de ses effets,” se rend coupable, pour ainsi dire, de *rebellion à justice*, et exempter ce débiteur d'un emprisonnement dont il est devenu passible, non parce que cet emprisonnement est la conséquence nécessaire des “relations” que la dette, dès son origine, a fait naître, entre lui et son créancier, mais bien parce que cet emprisonnement doit être la punition d'un acte en quelque sorte criminel de la part du débiteur ; punition que la loi a voulu être infligée d'une manière sommaire, ayant en cela un double objet, d'abord celui d'assurer, autant que possible, au créancier le paiement de sa créance, et puis celui de maintenir le respect dû à l'administration de la justice. En effet, ne serait-il pas étrange que le législateur eût voulu entièrement exempter de l'emprisonnement le débiteur qui se rend coupable, de *rebellion à justice*, tandis qu'il aurait en même temps continué d'y assujettir celui à qui son créancier pourrait n'avoir à reprocher que quelque fraude, même la plus petite.

Il me semble encore résulter de l'esprit et de l'ensemble des dispositions de l'acte de 1849, qu'elles n'ont été faites que pour cette classe de débiteurs contre lesquels le créancier aurait procédé par *Capias ad Respondendum*, comme ensuite par *Capias ad Satisfaciendum*, classe à laquelle l'Appelant ne se trouve pas appartenir.

Le statut divise les débiteurs en trois classes :

La première comprend les personnes qui, par la 1<sup>re</sup> section, sont entièrement exemptées d'arrestation et d'emprisonnement pour dette, savoir les prêtres ou ministres de la religion, les septuagénaires, les personnes du sexe, et encore toute personne soumise à une action civile, dont la cause a pris son origine en pays étranger, ou n'équivaut pas à la somme de £10.

La 2<sup>e</sup> classe est celle des personnes qui ne peuvent en aucune manière invoquer les dispositions de la loi de 1849, et qui continuent comme ci-devant, d'être soumises à l'emprisonnement pour dette. Ce sont les personnes déjà mentionnées comme faisant l'objet de la 15<sup>e</sup> section du statut.

Enfin la troisième classe comprend les débiteurs que le créancier peut encore faire arrêter et emprisonner, mais qui, en remplissant certaines formalités et se soumettant à certaines conditions, ont le droit d'être mis en liberté, soit en donnant caution ou autrement.

L'Appelant, qui n'est pas compris dans la première, non plus que dans la seconde classe, peut-il être considéré comme appartenant à la troisième ? Pour démontrer le négative, il suffit d'analyser la 8<sup>e</sup> section du statut, qui, dans certains cas, où le débiteur aurait pu être sujet, pour la satisfaction du paiement, à un bref de *Capias ad Satisfaciendum*, conformément aux lois en force avant la passation du statut, donne au créancier le droit de mettre ce débiteur en demeure de fournir un état sous serment de ses biens-meubles ou immeubles, et, à défaut de ce faire, d'adopter contre lui d'autres procédés d'une nature coercitive, ou pénale. "Tel Défendeur", porte la 8<sup>e</sup> section, " sera, après discussion de " ses meubles et immeubles apparents, suivant le cours ordinaire de la loi, tenu, sous trente jours à compter de la " signification qui lui aurait été faite personnellement d'une

“ copie certifiée de tel jugement, etc., etc.,” de donner et filer le susdit état. L’Appelant, il est de toute évidence, ne peut pas tomber sous cette disposition de la loi, et son créancier l’invoquerait inutilement contre lui, puisque non seulement il n’y a pas eu “ discussion de ses meubles et immeubles apparents,” mais que même il s’est opposé à cette discussion, en fermant sa maison. Avant le statut de 1849, l’Appelant était sujet à un *Capias ad satisfaciendum*; la 8e clause du statut frappe nommément les débiteurs soumis à cette procédure; et cependant elle ne saurait s’appliquer à un débiteur dans la situation de l’Appelant. Il s’ensuit donc que le *Capias ad satisfaciendum*, ou la contrainte par corps, dans le cas prévu par la 37e section de l’ordonnance de 1785, n’a pas été atteint par la loi de 1849, et que, par conséquent, cette procédure est restée dans toute sa vigueur.

- S’il ne devait pas en être ainsi, il faudrait dire que l’exemption que réclame l’Appelant, est une exemption absolue, de la nature de celle accordée par la première section du statut à certaines personnes qui y sont spécialement dénommées, bien que l’Appelant ne soit pas de ce nombre. Il n’est pas, non plus, fait aucune mention *expresse* dans aucune autre partie du Statut, des débiteurs qui sont dans la situation de l’Appelant. Ce qui encore, aux termes de la onzième section, prouve que le cas de l’Appelant n’est pas compris dans cette loi. En effet, après avoir énoncé que le statut n’a pas l’effet d’anéantir les dettes, cette section porte : “ mais toutes telles “ dettes continueront d’être les mêmes à tous égards, excepté “ seulement que le débiteur ne sera pas sujet à être *arrêté* “ ou *emprisonné* pour raison de telle dette ou dettes, s’il en “ est expressément exempté en vertu des dispositions du pré- “ sent acte.”

De plus, l’acte de 1849, ch. 42, est de même date que l’acte ch. 38, relatif à la Cour Supérieure et à la Cour de Circuit. La 64e section de ce dernier acte porte entre autres choses, que “ tous les pouvoirs dont la Cour Supérieure, ou les Juges

“ ou officiers de cette cour, respectivement, sont revêtus,....  
 “ pour *contraindre par corps* le Défendeur, ou la partie qui  
 “ résiste, ou qui essaie d’éluder frauduleusement l’exécution  
 “ d’un bref contre ses biens et effets, sont dévolus à la dite  
 “ Cour de Circuit, etc., etc.”

Cette disposition formelle, dans laquelle le débiteur qui, comme l’Appelant, se rend coupable de rébellion à justice, est nommément compris, et le droit de *contrainte par corps* contre lui, expressément reconnu et maintenu, fait bien voir que le législateur par l’acte, ch. 42, qui ne fait aucune mention de cette classe de Défendeurs, n’a pas pu vouloir la comprendre dans ses dispositions générales. L’on peut encore citer l’acte de 1851, (1) relatif à l’exécution de certains jugements. Après avoir énoncé, dans le préambule, “ qu’il était nécessaire d’établir un moyen plus efficace de “ donner suite aux jugements des Cours du Bas Canada, “ dans le cas de résistance à leur exécution,” cet acte porte, section 3e, “ que toute cour de justice aura les mêmes pou- “ voirs, en cas de résistance à ses ordres, en ce qui concerne “ toute vente ou autre procédure incidente, que ceux qui lui “ sont maintenant dévolus par les lois du Bas Canada, en “ cas de résistance à une saisie.”

Il est vrai que cet acte, sanctionné le 30 Août, 1851, est postérieur aux faits reprochés à l’Appelant; mais il n’en reconnaît pas moins que la contrainte par corps pour résistance à une saisie, existait alors, et que par conséquent, elle n’avait pas été abolie par la loi de 1849, ch. 42.

Enfin, une loi déclaratoire de la présente session de la législature, pour la promulgation de laquelle il n’y avait, dans mon opinion, aucune nécessité, ne permet plus d’entretenir aucun doute sur cette question. (2)

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(1) 14 et 15 Vict. ch. 90.

(2) 18 Vic. ch. 16.

Il reste un autre point à considérer, celui de savoir si, d'un jugement pour *contrainte par corps* dans le cas de la 37e section de l'ordonnance de 1785, il peut y avoir appel. Cette question semble avoir été en principe décidée dans la négative par la Cour Supérieure. Dans mon opinion, cette décision est erronée. Je crois que le droit d'appel en pareil cas a toujours été reconnu jusqu'ici. En outre l'article 12 du titre 34 de l'ordonnance de 1667 "De la décharge des contraintes par corps," du moins en autant qu'il peut s'appliquer à l'espèce, n'a pas été abrogé, que je sache, par aucune de nos lois statutaires. Or cet article 12 donne à la partie le droit d'appeler d'une sentence portant condamnation par corps, appel qui, suivant cet article, à l'effet de surseoir à la contrainte jusqu'à ce qu'il ait été terminé, si l'appel a été signifié avant que les *huissiers se soient saisis de la personne du débiteur*. Il s'en suit donc qu'aux termes de cet article seul, sans même arguer de quelques autres dispositions législatives, Mercure avait le droit d'interjeter appel de la Cour de Circuit à la Cour Supérieure, et de cette dernière Cour au présent tribunal.

Le jugement est motivé comme suit :

**La Cour &c.** 1o. Considérant que dans le cas prévu par la 37e section de l'ordonnance de 1785, ch. 2, il y a lieu de procéder contre un Défendeur au moyen d'une *contrainte par corps* de la nature d'un *Capias ad satisfaciendum*.

2o. Considérant qu'il y a preuve que le dit Félix Mercure s'est opposé, en fermant sa maison, à la saisie de ses effets, (l'un des cas prévus par la susdite ordonnance,) et que, par conséquent, le jugement de la Cour de Circuit, dont il a été interjeté appel à la Cour Supérieure siégeant à Montréal, savoir, le jugement du 28 Février, 1851, qui ordonne qu'un writ de *contrainte par corps* émane contre la personne du dit Mercure à l'effet de l'appréhender et de le détenir en prison

jusqu'à ce qu'il ait satisfait au jugement ci-devant rendu contre lui en cette cause, est un jugement bien fondé.

So. Considérant aussi que du dit jugement prononçant contre lui la contrainte par corps, la loi donnait au dit Félix Mercure, le droit d'interjeter appel à la dite Cour Supérieure, et que, par conséquent, la dite Cour Supérieure, en lui niant ce droit d'appel, et en le déboutant, pour ce motif seulement, par son jugement du 17 Juin 1851, de l'appel par lui interjeté comme susdit, a mal jugé, tandis qu'elle aurait dû sur le dit appel, rendre un jugement confirmatif du dit jugement de la Cour de Circuit : Infirme le dit jugement de la Cour Supérieure du 17 Juin, 1851 ; et cette cour procédant à rendre le jugement que, sur le dit appel, la dite Cour Supérieure aurait dû rendre, confirme le dit jugement de la Cour de Circuit avec dépens.

BURROUGHS, C. S., CROSS et BANCROFT, pour l'Appelant.  
LAFRENAYE, pour l'Intimé.

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#### SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

|          |   |                             |                                |
|----------|---|-----------------------------|--------------------------------|
| No. 519. | { | RANGER, <i>et al.</i> ..... | <i>Plaintiffs,</i>             |
|          |   | vs.                         | CHEVALIER, <i>et al.</i> ..... |

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Held :—That an action of damages, against several Defendants charged with breach of contract to convey a raft, cannot be dismissed on a *défense au fond en droit*, although by the conclusions it is prayed that the Defendants be condemned jointly and severally.

Jugé :—Qu'une action en dommages, contre plusieurs Désendeurs, par laquelle il est allégué qu'ils ont fait défaut de remplir un marché pour le transport d'une cage, ne peut être renvoyée sur une défense en dr. it, quoique par les conclusions il soit demandé que les Désendeurs soient condamnés solidiairement.

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Judgment rendered the 28th February, 1855.

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Action for £250 damages against Defendants, all of whom severed in their defences. The declaration alleged that the Plaintiffs hired "the Defendants" to convey a raft of timber from a place on the Ottawa River to Quebec, that the Defendants accepted the engagement and promised, for £6 5s. per

month (*each* not added) to convey the raft to Quebec. And that the Plaintiffs paid the passage of the Defendants to the place where the raft lay. That the Defendants remained on the raft only two days when they concerted together and abandoned it, then follows an allegation : "That in consequence of their said desertion from the employ of the Plaintiffs, and the violation of their engagement as above mentioned the Defendants have caused the Plaintiff great damage," then follows a detail of damage. Conclusion against the Defendants, jointly and severally, for £250 damages.

The Defendants severally pleaded a *Défense au fonds en droit*, on the ground that they were not in law responsible for the act or default of one another ; that there was no allegation of a joint and several contract, or of a contract by which the Defendants undertook to become so liable, and that the Plaintiffs had not alleged any *solidarité* of the Defendants towards the Plaintiffs, and that the action did not appear to be founded on a debt, but on an alleged breach of contract.

**DAY**, Justice : We see no difficulty in sustaining the declaration. It says in effect to the Defendants, "you all agreed to take my raft to Quebec, you all failed." We do not go so far as to say now, that the Defendants are jointly and severally liable. The Plaintiffs may not perhaps obtain a joint and several condemnation, but if not, they have merely asked too much, their action cannot be dismissed on the *défense au fonds en droit*.

**Judgment** : Considering that the action of the Plaintiffs "ought not by reason of the said answer in law, in the nature of a demurrer, or of any thing assigned in support thereof, and by law to be dismissed, doth dismiss the said answer in law with costs."

**LAFLAMME**, R. for Plaintiff.

**HUBERT, OUIMETTE and MORIN**, for Defendant.

## SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MEREDITH and BADGLEY,  
Justices;

No. 272. { DINNING, ..... Plaintiff,  
vs.  
JEFFERY, ..... Defendant.

The Plaintiff became the guardian of a vessel seized on the 10th under a Writ of *Saisie Revendication* addressed to the Sheriff, issued at the instance of the Defendant. Sometime afterwards, the vessel was launched by the parties in whose possession the vessel was at the time of the seizure, without any authority. She lay in port for fifteen months, and thereby suffered considerable damage. She moreover always remained, *de facto*, in the possession of the last named parties, and the disbursements incurred for the keeping and custody of the vessel were made, not by the Plaintiff, but by a brother of one of the parties who held possession of the vessel.

Held:—That in an action by the Plaintiff to recover these disbursements, he had, under the circumstances, no claim against the Defendant at whose instance the seizure had been made.

Le Demandeur devint le gardien d'un vaisseau saisi sur ses chantiers en vertu d'un Writ de *Saisie Revendication* adressé au Shérif, émané à la poursuite du Défendeur. Quelques temps après le vaisseau fut lancé par les parties en la possession desquelles il était lors de la saisie, sans aucune autorité. Le vaisseau resta dans le port pendant quinze mois, et souffrit en conséquence des dommages considérables. De plus le vaisseau resta toujours, en effet, en la possession des mêmes parties, et les déboursés encourus pour la garde du vaisseau furent faits, non par le Demandeur, mais par le frère de l'une des parties qui en était en possession.

Jugé:—Que dans une action par le Demandeur pour recouvrer ces déboursés, il n'avait, dans les circonstances, aucun droit de réclamer contre le Défendeur à la poursuite duquel le vaisseau avait été saisi.

—  
Judgment rendered the 9th April, 1855.

This was an action instituted for the recovery of the sum of £250, alleged to have been expended by the Plaintiff as guardian of a vessel, seized at the instance of the Defendant, in virtue of a writ of *saisie revendication*; the vessel being at the time in the possession of one John Shaw and one Richard Jeffery.

The Plaintiff's declaration alleged that on the 19th May, 1849, a writ of *saisie revendication* was issued out of the Court of Queen's Bench for the District of Quebec, at the suit of the Defendant, against John Shaw and Richard Jeffery, which writ was addressed to the sheriff of the said District, who, in virtue thereof, seized and revendicated certain goods and chattels, and in particular the vessel

called the "Agenoria," then being in the hands and possession of the said John Shaw and Richard Jeffery, and by the Defendant in the present cause alleged to be his. That the present Plaintiff, Dinning, was, on the 21st day of May following, duly constituted and appointed guardian of the said goods and chattels, and vessel, and accepted the charge ; and that the same continued to be and remain in the charge and custody of him, the Plaintiff, as such guardian, until the 25th April, 1850, when they were delivered over to the said John Shaw and Richard Jeffery in virtue of an interlocutory judgment of the Superior Court. That it became necessary for the guardianship and safe keeping thereof; and that, in fact, the Plaintiff had paid therefor the sum of £250 currency, which sum was still due and owing to him ; and that the Defendant, being the party Plaintiff and actor in the Revendication suit, was liable to pay Dinning that sum.

There was a second count for work and labor done, and materials provided for the Defendant, at the latter's request.

The declaration concluded by praying that the Defendant be condemned to pay the Plaintiff the said sum of £250.

The Defendant pleaded, 1o. a *défense au fonds en fait*, and 2o. by perpetual peremptory exception.

That if the Plaintiff in this cause was, or had been at any time, constituted or appointed guardian to the goods and chattels and vessel in the said declaration mentioned, he was so constituted and appointed, not by the Defendant in the cause, but by William Smith Sewell, at the time of the alleged appointment of the said Plaintiff as guardian, Sheriff of the District of Quebec ; and that the said appointment was so made without the knowledge, consent, or authority, and against the will of the said Defendant.

That at the time that it was alleged in and by the declaration that the Plaintiff was constituted and appointed guardian of the vessel and effects in the declaration mentioned, John Shaw and Richard Jeffery, also therein mentioned, held, detained and were in possession of the said vessel and effects, and so held, detained and possessed the same during the whole time that the alleged guardianship of the said Plaintiff continued; and that the said vessel and effects never were, at any time since the date of the writ of the *Saisie-Revendication* mentioned in the said declaration, in the possession of the Defendant, but had been and were in the possession of the said John Shaw and Richard Jeffery.

That the said Plaintiff, if at any time he was or had been constituted and appointed guardian of the said effects, was constituted and appointed as voluntary guardian to act without payment (*gardien volontaire sans gages*) thereto or therefor; and was so constituted and appointed upon and at the express suggestion and desire of the said John Shaw and Richard Jeffery.

That at the time that it is alleged in the declaration, that the Plaintiff was constituted and appointed guardian to the said effects, the said vessel called the "Agenoria," in the said declaration mentioned, was upon the stocks; and that the Plaintiff, unmindful of his duty in this respect, and in contempt of the Court, afterwards, to wit: in the course of the month of July, one thousand eight hundred and forty-nine, in concert with the said John Shaw and Richard Jeffery, launched or allowed the said bark or vessel to be launched from the stocks aforesaid into the river, against the will and consent, and without the authority of the Defendant.

That if the several sums of money mentioned in the Plaintiff's bill of particulars were expended by the Plaintiff, the

same were so expended against the will and consent, and without the authority of the Defendant; and were expended unnecessarily; and would never have been incurred had the Plaintiff permitted and allowed, as thereunto he was bound and obliged, the said vessel to remain on the stocks aforesaid.

That the Plaintiff ought not to be permitted to take advantage of an act performed by him wantonly, contrary to his duty, against the will and consent of the Defendant, and prejudicial to the interests of the latter, and avail himself of such act as a means of incurring expense which it was attempted to impose upon the said Defendant.

That in consequence of the gross negligence of the Plaintiff in this behalf, and in consequence of his wanton and improper conduct as aforesaid, in launching the said vessel, the same became and was greatly damaged, deteriorated and diminished in value, to wit, in the sum of three thousand pounds of current money of this Province.

That if the several other sums of money mentioned in the said bill of particulars not before particularly referred to, were expended by the said Plaintiff, the same were so expended unnecessarily, and against the will and consent, and without the authority of the Defendant.

That no contract did at any time intervene or was entered into between the Plaintiff and the Defendant in relation to the matters and things in the said declaration alleged.

That if the Plaintiff did at any time expend any sums of money in relation to the guardianship of the effects mentioned in the said declaration, or did expend the sums set forth in the said bill of particulars, the same were so expended unnecessarily, and without the consent or knowledge and against the will of the Defendant.

That if the Plaintiff was at any time guardian of the said effects, he, the Plaintiff, as such guardian, conducted himself so negligently, wantonly and improperly, that the said effects, and more particularly the vessel, the "Agenoria," in the declaration mentioned, became and were greatly damaged, deteriorated and lessened in value.

That the Plaintiff contrary to his duty as such guardian, in concert with others, and during the pending of such alleged guardianship, launched or allowed the said vessel to be launched from the stocks whereon she was at the time of the alleged appointment of the Plaintiff as such guardian ; whereby the said vessel became and was greatly damaged, deteriorated and diminished, to wit, to the extent of three thousand pounds of lawful current money of this Province.

To this the Plaintiff replied specially ; that after he was appointed guardian, the vessel in question, the "Agenoria," being then on the stocks became exposed to great damage and injury from exposure to the sun and other causes, and that it became necessary for the better safe keeping of the said vessel that she should be launched and taken to some more secure place ; that the Plaintiff, in accordance with his duty as such guardian as aforesaid, launched the said ship and removed her to a place of safe keeping ; that if the vessel had been allowed to remain on the stocks she would have been damaged and rendered altogether valueless.

The evidence established that at the time the vessel was seized she was on the stocks, where she remained ready for launching until about six weeks afterwards, when she was launched by John Shaw and Richard Jeffery, neither the Plaintiff nor Defendant in the cause being present,—That no permission to launch had been demanded by the Plaintiff,—That the vessel was then towed to one of the wharves at Quebec, where she remained all summer exposed to the action of the sun and weather, and was then taken to winter

quarters, where she remained till August, 1850, having during the winter been exposed to the action of the ice,—That from these causes the ship had suffered damage, and had moreover been detained in the port of Quebec for fifteen months after being launched, the consequence of which was that she lost that period on the letter A. 1,—That the vessel was to have been classed at Lloyds, and the number of years she had to run under her letter would date from the launching, and thus, had the ship been sent to England after being launched, she could have had seven years to run under the letter A. 1, whereas, in consequence of her detention at Quebec, she lost fifteen months of that time, and could only class as a ship of five years and nine months under that letter,—That this reduced her in value, thirty shillings currency per ton, and that had the ship remained on the stocks during these fifteen months, she would have benefited by seasoning, and would have classed for an additional year at Lloyd's, that is, for eight years, and that circumstance would have increased her original value, twenty-five shillings currency per ton,—That the other damages caused the ship in her rigging from exposure would amount, it was sworn, to three pounds currency per ton,—That the ship could have been housed in on the stocks at a comparatively trifling cost.

It was made a point by the Plaintiff that in another case, the present Defendant had sworn that the ship was suffering injury from being kept on the stocks, but the answer was that the Defendant then wished the vessel to be sent to sea at once to realize the money laid-out and earn freight, not to detain her at Quebec to her great injury.

The Plaintiff failed to establish that any monies had been expended by him about the guardianship or keeping of the ship. The moneys were advanced by Mr. Samuel John Shaw, brother to John Shaw, above mentioned. The Plain-

tiff had given a written authority to expend monies, but the order was also given to expend, as well under the seizure mentioned in the declaration, as under a seizure of the same vessel made by a different party, nine days previous to the seizure of the ship under the writ mentioned in the declaration. Samuel John Shaw had obtained a kind of check, (written by his brother John) signed by the Plaintiff's clerk for the amount of the disbursements, payable to the Plaintiff's order. This check was not endorsed, and had never been presented at the Bank. It was established that the ship had always remained in the possession of John Shaw and Richard Jeffery until they sent her to sea, bail having been given to answer the action in revendication.

**MEREDITH, Justice :** The Plaintiff in this cause was named voluntary guardian of a ship called the "Agenoria," which was seized on the 21st day of May, 1849, under a writ of *Saisie-Revendication*, which had issued from the late Court of Queen's Bench for this District, in a cause, wherein James Jeffery, the present Defendant, was Plaintiff, and Messrs. John Shaw and Richard Jeffery, were Defendants.

The Plaintiff, as having been such *gardien volontaire*, now seeks to recover certain sums of money, disbursed by him, as he alleges, in that capacity. The charges sought to be recovered, amount altogether to £241 14 8, and may be divided, into those which relate to the launching of the ship; and those which relate to the watching of the ship.

As to the charges for launching, even if the vessel had been launched by the Plaintiff, instead of having been launched as it was by Messrs. John Shaw and Richard Jeffery, (the Defendants upon whom it was seized,) I do not think those charges should be allowed, as against the present Defendant. The guardian in my opinion had no authority to launch the ship, he should not have attempted to move it from the stocks, without at least the authority of the Sheriff.

Moreover, the evidence establishes, that as the vessel remained in the port for more than a year, after the Plaintiff allowed Shaw and Jeffery to launch it, the launching of the vessel was more injurious than beneficial to the owner. There is, it is true, some conflicting evidence on this point, but the weight of evidence, in my opinion, is decidedly against the now Plaintiff, formerly the guardian.

Thomas Hamilton Oliver, an experienced ship builder, who has been examined by the Plaintiff, gives important evidence on this point, he says: "The difference in the value of the ship from having been in the port of Quebec a year from the time she was launched until the period of the survey, would make her class a year less, and every succeeding year of course in proportion. If the certificate shewed that she had been launched for two years, it would take two years off her age ; the certificate shews the age of the vessel."

Question by Plaintiff.—"Would a ship be deteriorated in value by remaining on the stocks, when ready for launching, for the period of upwards of a year to an extent greater than the difference in value occasioned by her having been launched a year before she was classed." Answer—"No, if she had been covered over on the stocks she would have been of greater value. The difference of a year in the rate of a vessel would affect her value to the extent of ten shillings per ton. Cannot say what it would take to launch ship, not having dimensions."

John James Nesbitt, a shipbuilder of 20 years standing, and who declares he has built seventy ships, says: "Had the "Agenoria" been left on the stocks, covered in with a shed, that is housed over, a streak of plank taken out of her bottom on each side, her hatches left open, to allow a free ventilation, the ship would have increased in value

"thereby, and this increase would have been very considerable." This witness also swears, that the classification of the vessel at Lloyds, would date from the time of her being launched, "and therefore she would have fifteen months less to run under her letter," which he estimates as a loss of 30 shillings per ton. The evidence of these witnesses, confirmed as it is by that of Messrs. Daniel Ross, William Lamson, Alfred Rudolph and John Dunn, all men of experience, and competent to speak on the subject, outweighs, in my opinion, the testimony offered on this point by the Plaintiff. The witnesses of the Plaintiff seem to have testified, rather as to the ordinary cases in which ships when launched may go to sea, than as to the extraordinary case under our consideration, in which the vessel had to remain in port 15 months after it was launched. These remarks are also applicable to an affidavit made by the Defendant, and of which a copy is contained in Plaintiff's exhibit A. The object of the Defendant in making that affidavit, was evidently to have the vessel launched, so that it might go to sea, and earn freight; and not to have it launched merely to lie idle in port. For these reasons, even were there no others, I would reject the charges for launching.

There is however a more fatal objection to the Plaintiff's claim than either of those which I have mentioned; an objection which extends to the whole of the claim, it is this, that when the disbursements which the guardian claims were made, the vessel was not in his possession, as it aught to have been, but on the contrary was in the possession of the Defendants, from whom the Court had ordered it to be taken. In reality the Plaintiff never acted as guardian. It is indisputable that John Shaw and Richard Jeffery, (the Defendants upon whom the seizure was made) had full control of the "Agenoria," from the time the seizure was effected until it was determined. It is proved that Mr. John Shaw, or his brother, paid the watchmen; and John Shaw and Richard Jeffery

launched the ship ; that Richard Jeffery took the ship to Tibbit's cove where it remained during the summer. That in the fall John Shaw was on board when the vessel was taken from the Point Levy side to Black's booms, and that during the winter the vessel still continued under their control. In fact, although the writ of *Saisie-Revendication* which issued at the instance of the present Defendant, ordered the ship which was of the value of about £6000, to be taken out of the possession of Shaw and Jeffery, yet the Plaintiff, as guardian under that writ, allowed that vessel to remain in their possession, and they seem to have done with it what they liked. In the present case, it so happens, that the dereliction of duty on the part of the guardian has not been attended with any very bad results ; but if such conduct, on the part of guardians, were tolerated, it could not fail to be attended in many cases with the most injurious consequences. We are bound to see that the writs which, in pursuance of law, issue from this Court, are strictly obeyed. This was far from being done with respect to the Writ of *Saisie-Revendication* in question. Indeed the expenses now sought to be recovered, were incurred, not by the Plaintiff's obedience to the writ, but by Messrs. Shaw and Jeffery, and in consequence of the Plaintiff not having obeyed the writ. The Defendant in the present case had a plain legal right, under his writ of *Saisie-Revendication*, to cause the vessel in question to be kept out of the possession of Messrs. Shaw and Jeffery so long as it was under seizure. If his right in that respect had been enforced ; he might reasonably be required to pay the costs incident to the enforcing of that right, but it was not enforced ; and therefore, the guardian can have no such claim against the person at whose instance he was appointed, but whose rights he wholly neglected. We cannot maintain the present demand without sanctioning an illegal proceeding, and holding out a premium, for desobedience to the writs of our own Court, I therefore concur in the judgment dismissing the action.

**BADGLEY**, Justice : I do not look so much to the damage occasioned to the vessel from launching, inasmuch as it appears by the record that the Defendant was equally desirous of launching. The Defendant states in a petition, of record in the case, that the vessel in question was ready for launching, and that he was about to launch her, therefore I do not attach much weight to this circumstance.

The only question which appears to my mind to come before us is this,—the guardian sues for charges incurred by him in the guardianship of the vessel, and there is not one title of evidence in the case to shew that he ever expended one farthing upon her ; the witnesses produced to testify to this point are the two brothers Shaw, John Shaw and Samuel John Shaw, and their evidence is so contradictory, that all that can be deduced from it is, that the whole of the monies for the expenses of guardianship of the vessel in question, were expended by one or the other of them. The action must therefore be dismissed.

Judgment ; The Court &c. Considering that, at the time of the appointment of the Plaintiff, and of his acceptance of the office of *gardien volontaire*, under the writ of *Revendication* issued at the suit of the said James Jeffery, to attach in the hands of John Shaw and Richard Jeffery, the bark or vessel called the “Agenoria,” and the effects attached in virtue of the said writ, as mentioned in the Plaintiff’s declaration, the said bark or vessel, and the said effects, were in the possession of the said John Shaw and Richard Jeffery, who continued thenceforward to hold the same during the period of the Plaintiff’s alleged guardianship of the said bark or vessel and effects ; and further considering that the said Plaintiff hath not sufficiently established that he had paid or expended any sum of money in and about the guardianship and safe keeping of the said bark or vessel and effects, doth dismiss the said action with costs.

**HOLT** and **IRVINE**, for Plaintiff.

**POPE**, Thos. for Defendant.

## **SUPERIOR COURT.—QUEBEC.**

**Before BOWEN, Chief Justice, MERIN and BADGLEY,  
Justices.**

Held:—That a *mineur marchand* can be sued and condemned for debts contracted in the transaction of his business, without its being necessary that a tutor should be appointed to him, such minor being with respect to such transactions reputed of full age.

Jugé:—Qu'un mineur marchand peut être poursuivi et condamné pour les dettes contractées par lui pour le fait de son commerce, et sans qu'il soit besoin de lui faire nommer un tuteur, tel mineur étant à l'égard de son commerce réputé majeur.

Judgment rendered the 2nd May, 1855.

This was an appeal from a judgment rendered in the Circuit Court for the Saguenay Circuit, on the 1st day of March 1855, whereby the Appellant's action was dismissed.

The action began by *saisie arrêt* and *arrêt simple*, and was brought for the sum of £49 18 3 currency, being the amount of the Respondent's promissory note in favor of the Appellant, and of an account for goods, wares and merchandise, sold and delivered by the Appellant to the Respondent.

The Respondent pleaded by perpetual peremptory exception:—

That he was at the time of the institution of the action, and was still a minor, and in consequence of his minority, could not be compelled to answer the present action. (1)

To this the Appellant replied specially :—

(1) 1 Joussea, Comm. sur l'Ord. de 1667, Titre 3, part 1, sec. 3, p. 16 :—Ibid., Titre 3, Art. 3, p. 22 :—1 Argou, lib. 1, Cap. 5, p. 28, Cap. 8, p. 63 et Cap. 9, p. 71 :—1 Coutume de Paris, Art. 270 :—Pothier, Traité des Personnes, Titres 5 et 6, sec. 5, Art. 3 :—Meilé, Traité des Minorités, Cap. 2, sec. 6, pp. 19, 17 et 18 :—Ibid., Cap. 9, sec. 1, p. 226, Cap. 10, sec. 6, pp. 269 et 270 :—Pothier, Procédure Civile, Cap. 1, Art. 2, p. 7 :—Dumoulin, Part. I, Cap. 39, p. 442 :—Cooper vs. McDougall, Superior Court, No. 51, Judgment rendered 31st March, 1854 :—Grande Coutume de Ferrière, Art. 94, col 1, pp. 446-6 et seq.

That at the time the Respondent contracted the debt which occasioned the suit, and also at the period of the institution of the action, he, the Respondent, was a merchant and trader; and that the promissory note given, and the effects purchased, mentioned in the account upon which the action was brought, were for the purposes of his trade and commerce, and the debt contracted by him in the course of his business as such merchant and trader; that by law, the Respondent being a *mineur marchand et commerçant*, was liable and could be sued for debts contracted in the exercise of his business as a merchant. (1)

The Respondent admitted the facts alleged in the Appellant's special answer.—That he was indebted to the Appellant in the sum sued for, that he had contracted the debt for the purposes of his business, and that he was a merchant and trader.

The Respondent produced his certificate of baptism in support of his plea of *minorité*.

#### Judgment :

Considérant que par la loi un *mineur marchand* peut contracter et s'obliger pour le fait de son commerce, et est réputé majeur à cet égard, sans qu'il puisse être restitué sous prétexte de minorité. La cour, en conséquence, renverse le jugement rendu en cette cause en la Cour de Circuit pour le Circuit de Saguenay, en date du premier jour de Mars, mil huit cent cinquante-cinq, et condamne le dit Intimé à payer au Demandeur, Appelant, la somme de quarante-

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(1) 2 Rep. de Guyot, vbo. Marchand, p. 274 :—Idem, vbo. Mineur, p. 528 :—9 Idem vbo. Judgment, p. 632 :—2 Fer. Dic. de Droit, vbo. Mineur-Négociant, pp. 231 et 232 :—1 Rogue, Jurisprudence Con. pp. 21 239 et 240 :—Jouze Comm. sur l'Ord. 1669 et 1673, pp. 199, 200, 201 et 202 :—1 Savary, Parfait Négociant, pp. 266, 267, 268, 269 et 270 :—1 Bornier, Conf. p. 111 :—2 Bornier, Conf. pp. 457, 465, 467 et 468 :—4 Brillon, vbo. Marchand Mineur, pp. 202 et 203 :—Idem, vbo. Mineur, p. 373 :—Practicien des Juges Consuls, pp. 17, 18, 19, 20 et 21 :—Merlin, Répertoire, vbo. Mineur, p. 236 :—2 Revue, p. 78, Black vs. Esson, Reported in the Analytical index.

cinq louis huit chelins et trois deniers courant, pour balance de marchandises à lui vendues et livrées par le dit Appelant, et pour le montant du billet promissoire mentionné dans la déclaration en cette cause, avec intérêt depuis la demande judiciaire,—et quant à l'arrêt simple et la saisie-arrêt, la cour les déclare bonnes et valables et le tiers-saisie est ordonné de vider ses mains en celles du Demandeur, le tout avec dépens contre l'Intimé, tant de cette cour que de la Cour de Circuit.—Ordonne que le record soit transmis à la Cour de Circuit.

**CASAVULT and LANGLOIS**, for Appellant.

**OLIVA**, for Respondent.

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SUPERIOR COURT.—QUEBEC.

Before **BOWEN**, Chief-Judge, **MEREDITH** and **MORIN**,
 Justices.

No. 1426. { **LAING, et al.** *Plaintiffs*,
 vs.
 { **BRESLER**, *Defendant*.

Held :—That an affidavit for a Writ of *Saisie Arrêt simple* in which it is alleged, “that Deponent is credibly informed, hath every reason to believe, “and doth verily in his conscience believe “that the Defendant hath secreted, and “is about to secrete his estate, debts and “effects, with intent &c” is sufficient, and in accordance with the 27th Geo. III, cap. 4, sec. 10, and the form given in the 9th Geo. IV, cap. 27.

Jugé :—Qu'un affidavit dans lequel il est allégué “que le Déposant est informé d'une manière cro�able, à toute raison de croire, et croit vraiment dans sa conscience, que le Défendeur a récélé, et est sur le point de récéler ses biens, dettes et effets dans la vue de frauder, etc.,” est suffisant, et tel que voulu et requis par le statut 27 Geo. III, c. 4, sec. 10, et la forme donnée dans la 9e Geo. IV, c. 27.

 Judgment rendered the 12th February, 1855.

The action was commenced by a writ of *saisie-arrêt*, upon the return of the writ the Defendant moved to quash the same upon the ground, that the affidavit upon which it issued did not contain sufficient proof that the Defendant was about to secrete his estate, debts and effects.

The affidavit was made by the legal Attorney of the Plaintiffs, and after alleging the indebtedness and cause of debt, set forth.

"That Deponent is credibly informed, hath every reason to believe and doth verily in his conscience believe, that the said Alexander Bresler hath secreted, and is about to secrete his estate, debts and effects, with intent to defraud the said A. E. Laing & Company, his creditors as aforesaid, and is immediately about to depart from the Province of Canada, with such intent, by means whereof, without the benefit of a writ of *arrêt-simple* to attach the estate, debts and effects of the said A. Bresler, in his own hands, the said A. E. Laing & Company, may lose their said debt, or sustain damage."

The motion to quash was made upon the ground,—

"That the writ of *arrêt-simple* was issued, and the seizure in virtue thereof made, without there being due proof on oath, that the Defendant was about to secrete his estate, debts and effects, or that he was immediately about to leave the Province of Canada, with intent to defraud the Plaintiffs, in the manner and form prescribed by the Statute 27th, Geo. 3, Cap. 4, Sec. 10."

It was contended by the Plaintiff, upon showing cause against the motion, that the requirements of the Statute in question were complied with, by employing the terms used in the affidavit in the cause ; that the obligation to swear positively "that the Defendant was secreting his estate, debts and effects, &c.," would amount to an absolute denial of justice, as the known caution observed by debtors acting with fraudulent intent, in almost all cases precludes the possibility of the creditor being able to make any such positive affidavit ; and that the Legislature appear-

ed to have put the same interpretation upon the Statute in question, as by the Statute 9th, Geo. 4, Cap. 27, it had prescribed a form of affidavit necessary to be made for writs of *saisie-arrest* and *arrêt-simple*, and that the affidavit in the present case contained the precise terms prescribed by the form of affidavit in question.

It was maintained in support of the motion that the 27th Geo. 3, Cap. 4, Sec. 10, regulated the proof required for the issuing of writs of *saisie-arrest* and *arrêt-simple*, and that by this Statute it was prescribed that the affidavit should allege "that the Defendant was about to secrete his estate, debts and effects, &c., and not merely, as the affidavit in the present cause, "that the deponent was credibly informed, had every reason to believe, and did verily believe, that the Defendant had secreted and was about to secrete, &c." that the affidavit in this cause not having alleged, positively, that the Defendant was about to secrete his estate, debts and effects, the writ of *arrêt-simple* and attachment made under the same, should be set aside and quashed.

MEREDITH, Justice : In substance remarked, that the affidavit in this case was according to the form given in the 9th Geo. 4, Cap. 27 ; which may be regarded as a declaration by the Legislature, as to the nature of the affidavit required under the 27th Geo. 3, Cap. 4.

That there were many cases in which an attachment ought to issue, and yet in which the creditor might not be able to make a positive affidavit from his own personal knowledge, "that the Defendant is about to secrete his "estate, debts and effects, &c.," or "that the Defendant "doth suddenly intend to depart from the Province with intent to defraud, &c." In such cases an affidavit, "that

"the creditor is credibly informed, hath every reason to believe and doth verily in his conscience believe that the Defendant is immediately about to secrete his estate, debts and effects, &c.," ought to be deemed the "due proof on oath to the satisfaction of one of the Judges, &c.," required by the 27th Geo. 3, Cap. 4. Affidavits in that form have repeatedly been held good by this Court, and we see no reason for deviating from our previous decisions. (1) His Honor added, that as the question was one admitting of doubt, that it would be well for parties suing out attachments, to use the precise words of the 27th Geo. 3, Cap. 27, whenever it were possible.

Judgment :—

The Court &c., considering that the affidavit upon which the said writ of *arrêt-simple* hath issued is sufficient to justify the issuing of the said writ. It is ordered that the Defendant take nothing by his said motion : And the Court doth condemn the Defendant to pay to the Plaintiffs the costs of the said motion.

HOLT and IRVINE, for Plaintiffs.

BAILLARGE, L. G. for Defendant.

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SUPERIOR COURT.—MONTREAL.

Before DAY and VANFELSON, Justices.

No. 395. { LEVERSON, *et al.* ..... Plaintiffs.  
vs.  
CUNNINGHAM, ..... Defendants.

Held :—That an affidavit for an attachment, *saisie-arrêt*, must be made in the terms and according to the provisions of the 27th Geo. III, c. 4, sec. 10, otherwise such attachment will be quashed.

Jugé :—Qu'un affidavit pour un writ de saisie-arrêt, doit être fait dans les termes et d'après les dispositions de la 27e Geo. III., c. 4, sec. 10, autrement telle saisie-arrêt sera déclarée nulle.

Judgment rendered the 29th September, 1854.

In the affidavit for a Writ of Attachment before judgment,

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(1) 4 L. C. Reports, p. 49 Shaw vs. McConnel, :—Henderson vs. Hachette. Sup Ct. of 1852.

it is set forth—" that James Cunningham, formerly of New-York aforesaid, but now of Montreal aforesaid, jeweller, and one Coles, both doing business together at New-York aforesaid, under the name or firm of Cunningham and Coles, are personally, jointly and severally, indebted to the Deponent, and the said George B. Leverson, as such co-partners, in a sum exceeding &c." Stating ground of debt. " That the Deponent hath reason to believe that the said James Cunningham, who is now detained in jail, under a Writ of *Capias ad Respondendum* issued in this cause, wherein the said George B. Leverson and this Deponent are Plaintiffs, and the said James Cunningham was Defendant, was immediately about to leave and depart from the Province of Canada, with intent to defraud this Deponent and the said George B. Leverson, and that he hath secreted and is about to secrete his property, debts and effects with a like intent."

On motion the Attachment was quashed—"the affidavit  
"not being made in the terms and according to the provisions  
"of the Ordinance, 27 Geo. III, c. 4, sect. 10."

**DAVID and RAMSAY, for Plaintiff.**

**DEVLIN and DOHERTY, for Defendant.**

## **SUPERIOR COURT.—MONTREAL.**

Before DAY, SMITH and VANFELSON, Justices.

Held:—That the delay for filing an exception à la forme, when security for costs is demanded, will run from the day when such security is given.

Jugé :—Que le délai pour filer une exception à la forme, quand il est fait une demande de cautionnement pour les dépens, ne court que du jour où tel cautionnement est donné.

**Judgment rendered the 28th February, 1855.**

Motion to reject exception à la forme, as not filed within the four days limited by the Statute. The Writ was returned the

25th January ; notice given on the 26th January of a motion for security for costs on 17th February, security was entered by consent on the 14th, and an *exception à la forme* filed on the 17th February. Motion to reject exception dismissed on the ground that as the right to security for costs was given by Statute, the stringent rule laid down by the Judicature Act, must be so construed as not to deprive the Defendant of his rights.

**MORRIS and LAMBE**, for Plaintiff.

**MOREAU, LEBLANC and CASSIDY**, for Defendants.

### SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

No. 556. { The Honble. Lewis T. DRUMMOND,  
Attorney General, *pro Reginna...* Petitioner,  
vs.  
The MUNICIPALITY of the County of  
Shefford..... Defendant.

Held :—That under the 16 Vict., c. 138, a By-law of a County Municipal Corporation which authorizes a subscription for shares of stock, on a Railway passing through the county, and for the issuing of Debentures to pay for such shares, is void if no provision is made in the By-law for imposing an annual rate or assessment for the payment of interest, and the establishment of a sinking fund.

Jugé :—Que sous la 16<sup>e</sup> Vict., c. 138, un Règlement d'un Conseil Municipal ou Comité qui autorise le maire ou autre personne à prendre et à souscrire des actions, dans le capital d'un Railroute passant à travers tel comité, et à émaner des Débentures pour le paiement de telles actions, est nul si par tel Règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement.

This was a petition under the 12th Vict., c. 41, to set aside a By law of the Municipality of Shefford, dated the 13th December, 1853, authorizing a subscription of stock in the " Stanstead, Shefford and Chambley Railroad," on behalf of the parish of south Stukeley, to the extent of £6250 currency. The sole ground relied on in the petition was that the By-law contained no provision for imposing a rate for payment of the annual interest on the debentures, and for the establishing of a sinking fund. The By-law is in the following terms :

"Moved by councillor Goddard, of the parish of south Stukeley, and it was resolved ; that whereas by an Act of the Provincial Parliament 16th Vict. c. 138, 'certain municipalities in Lower Canada are authorized to take stock in any Company formed for the construction of any Railway passing their respective counties ; and whereas by a certain other Act, 16 Vict. c. 213, the said authorization is extended to all county, town and village municipalities in Lower Canada, and by the second section of the said last cited Act, it was provided that a county may take stock on behalf of one or more townships or parishes, more especially interested in such Railway, than the other townships or parishes within the said county ; the county to hold the stock for and on behalf of said townships or parishes, and the sum or sums necessary for paying such stock, or the instalments thereon, and the principal and interest of any debentures issued for raising money to pay for any such stock or instalments, shall be raised by assessment on the rateable property of such township or parish only, and not upon the other townships or parishes of the county ; and whereas the construction of the Stanstead, Shefford and Chambley Railroad is an enterprise in which the parish of south Stukeley is especially interested, and the municipal councillors for the said parish of south Stukeley this day present, at a regular session of the municipal council of the county of Shefford, to wit : George Anson Goddard, and Luke Holland Knowlton, having duly and legally voted for the passing of this By-law : be it therefore enacted by the Municipal Council of the Municipality of Shefford :"

" 1st. That the mayor of this municipality is hereby authorized to subscribe to the capital stock of the " Stanstead, Shefford and Chambley Railroad Company," on behalf of the said parish of south Stukely, the sum of six thousand two hundred and fifty pounds currency, said stock, so subscribed, to be held by the municipality of Shefford, on behalf of said parish of Stukely, as by law provided.

2nd. That the mayor is authorized to borrow the necessary sums to pay the instalments required, and to issue for that purpose bonds or debentures signed by himself and the secretary-treasurer, for the payment of such loans, or to pay any calls or instalments with the said bonds or debentures.

3rd. The said bonds or debentures shall bear interest at six per centum per annum from the date thereof, and shall not be issued for less than one hundred pounds currency each.

4th. The bonds and debentures shall not be made payable at any time less than twenty-five years from the date thereof."

The Defendants pleaded a *défense au fonds en droit* on the ground that the imposition of a rate for the purposes mentioned need not be made by the By-law. The *défense* was dismissed on the 30th December, 1854, by DAY, SMITH and MONDELET, Justices. A *défense au fonds en fait* was also pleaded. The proof consisted of admissions of the copy of the By-law filed. The Judgment is in the same terms as in the case against the municipality of Two Mountains. (1)

**ROBERTSON, A and G. Counsel for Petitioner.**

**Rose and Monk, for Defendant.**

(1) *Ante p. 155.*

**SUPERIOR COURT — MONTREAL.**

Before DAY, SMITH and MONDELET, Justices.

|           |   |                                                 |
|-----------|---|-------------------------------------------------|
| No. 1923. | { | The Honorable L. T. DRUMMOND, Attorney General, |
| No. 1228. |   | <i>pro Regina.</i>                              |

vs.

The MUNICIPALITY of the County of Shefford.

The same Judgment was rendered in two cases on similar By-laws, the one authorizing a subscription of stock in the same Railway on behalf of the Township of Shefford, to the extent of £12,500; and the other on the behalf of the Township of Farnham to the extent of £15,000.

Judgments rendered the 30th April, 1855.

**ROBERTSON, A. & G., Counsel for Petitioner.**  
**Rose and Monk, for Defendants.**

## **CIRCUIT COURT.—QUEBEC.**

## **Before Power, Justice.**

Held:—1. That where a steamboat, running between Quebec and Montreal as a tow-boat, takes the place of a passenger boat, her owner assumes the duties and liabilities of a common carrier with respect to the baggage of the passengers.

2. That where a passenger on board such boat leaves luggage on the deck, outside of the cabin door, and is told by an employee on board the boat, that it is safe in such place, the owner of the steamboat, in the event of the luggage being taken away and lost, is liable for the value thereof.

Jugé :—1. Que lorsqu'un vapeur faisant le service de la remorque entre Québec et Montréal, prend la place d'un bateau pour le transport des passagers, le propriétaire de tel vapeur prend sur lui les devoirs et la responsabilité d'un commissionnaire ordinaire par rapport aux effets des passagers.

**2.** Dans le cas où un passager sur tel vapeur laisse ses effets sur le pont, en dehors de la porte de la chambre, sur ce qui lui est dit par un employé à bord que ses effets sont en sûreté dans tel endroit, le propriétaire du vaisseau devient responsable pour la valeur d'ceux, dans le cas où ils sont emportés et perdes.

Judgment rendered the 23rd May, 1855.

**POWER, Justice :** This action is against the owner of the steamboat "Alliance" for the recovery of the value of a portmanteau and certain articles of wearing apparel which it contained, belonging to the Plaintiffs, lost on a voyage from Quebec to Montreal.

The facts in evidence are these :—Mrs. Bankier, one of the Plaintiffs, went as passenger in the “ Alliance,” whereof the Defendant is owner, on the 14th October, 1853, from Quebec to Montreal. Her luggage consisted of two carpet bags and the portmanteau in question. She was accompanied on board by a gentleman who made her known to the Defendant’s son, who was the purser of the boat, and to whom she paid the usual fare for her passage.—It does not appear whether there was any captain or other person in command of the boat besides the purser. Her carpet bags were carried into the ladies cabin. The gentleman observing where the portmanteau was placed, said to Mrs. Bankier that she had

better have it brought into the cabin, whereupon (I use the words of the witness) "a man there, evidently belonging to the boat, and acting as if he did, said it was perfectly safe there." Upon the arrival of the boat at Montreal, the portmanteau being missing, Mrs. Bankier applied to the purser, who caused search to be made for it, and the man who said "it was perfectly safe there" being sent for, also made search for it, and brought her one which did not belong to her. The portmanteau not being found, she was obliged to land at Montreal without it, the purser telling her it might probably have been put on shore at one of the intermediate ports, and that he would make inquiry about it, which he afterwards did, but without effect.

It is further in evidence, that the Defendant during the navigation season of 1853 had the "Alliance" employed as a tug and freight boat, between the cities of Quebec and Montreal, and when the passage boats of the regular line between those cities became disabled he occasionally put the "Alliance" on the line as a passage boat to *fill their place*. That there was no person on board the "Alliance" specially charged with the care of the baggage of passengers, although it is the invariable usage in steamers plying between Quebec and Montreal to have a man employed for that express purpose. Neither was there any place on board set apart for baggage. The description and value of the articles are proved by a person who assisted Mrs. Bankier to put them into the portmanteau. They were such articles of wearing apparel as were suitable and necessary to the rank and condition of Mrs. Bankier, and such as a lady would need to take with her in travelling, as necessary luggage. They are proved to have been worth £50, although their value is limited by the action to £48.

The Defendant pleaded the general issue, and it was argued on his behalf, that no delivery of the portmanteau, so

as to charge him with it, was made, and that even if a delivery of it had taken place, his liability was that of an ordinary Depository and not of a Common Carrier, and that he was not, in the absence of any proof of gross negligence, or in other words, of a violation of good faith on his part, responsible for its loss, because, according to the law of bailments, his contract was *to keep the bailment* and not *to keep it safely*.

It was contended for the Plaintiffs that the Defendant was a common carrier and obliged, not only *to convey the portmanteau*, but, *to convey it safely*, and, therefore, responsible for slight negligence.

From the facts of this case, two questions arise for decision :

1st. Was the Defendant, owner of the Alliance, on the occasion in question, a common carrier ?

2nd. Was there such a delivery or surrender of the portmanteau into the charge of any of his servants, on board that boat, as to render him responsible for it ?

There being no decided case precisely similar to the present, it becomes necessary to recur to the origin and reason of the law in relation to Common Carriers, and to ascertain what are the judicial decisions upon facts analogous to the present case.

The origin of the law is found in a special edict of the Roman Praetor by which ship-masters, inn-keepers and stable-keepers were put under a peculiar liability, and made responsible for all losses not arising from inevitable casualty or overwhelming force, and this edict was afterwards adopted by almost every country in Continental Europe. In England, however, the rule respecting the three classes of persons was applied with stricter severity in the common law, than in the roman law. The reason assigned by Lord Holt for this severity, is as follows :

"The law (says he) charges this person (the Carrier) thus intrusted to carry goods, against all events but the acts of God, and of the enemies of the King ; for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these Carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves &c., and yet doing it in such a manner as would not be possible to be discovered."

Sir William Jones says that, the reason for this doctrine is, not the reward which the Carrier is to receive, but the public employment exercised by him, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience to society. He is treated as an insurer against all but the excepted perils, upon that distrust which an ancient writer has called the sinew of wisdom. Mr. Justice Story, in commenting approvingly upon this law, says : "The soundness of this public policy, in subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder, can hardly admit of question ;" and Kent, referring to the numerous cases of recovery against Common Carriers, without any fault on their part, that able commentator says : "We cannot but admire the steady and firm support which the English Courts of Justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies or yielding to the hardship of a particular case." He adds—" If it were not for such rules, the Carrier might contrive, by means not to be

detected, to be robbed of his goods in order to share the spoil." (1)

These *dicta* explain the reason of the English common law, in relation to Common Carriers ; and the only difference that exists between it and the French law is, that by the latter law a third exception, namely, *force majeure*, or irresistible violence, is created. In all other respects they are perfectly similar, and the responsibility of the owners of river craft, under this law, has been recognized in the year 1821, in the case of Borne against Perrault *et al*, and again in the year 1834, in the case of Hart, Appellant, and Jones, Respondent, to be the common law of Canada. (2)

The law seems now to be settled , that in regard to the persons of passengers, the proprietors of steamboats and rail-cars are not to be deemed Common Carriers, so as to be liable for all injuries and damages from which, as Common Carriers, they would not be excused ; but in regard to their liability for the necessary luggage of passengers, they are considered Common Carriers. The fare paid for the passage includes payment for the carriage of the luggage, and therefore as regards the luggage, the slightest neglect, *levissima culpa*, will render them responsible for it.

Upon the second question, it seems to me, that in order to render the Defendant responsible for the portmanteau, there must have been a delivery to, or an acceptance on the part of some one of his servants on board the boat, (3) either in a special manner or according to the usage of passenger boats, but such acceptance may be either actual or constructive, and it is sometimes a matter of great nicety to decide upon the circumstances of the case , whether there has been such a

(1) 2 Kent's Com., p. 602.

(2) Stuart's Reports, p. 589.

(3) Wils R. 281, Dale vs. Hill :—2 M. & S, 173, Bocha vs. Combie :—2 Kent.

delivery or acceptance, or not. It is only by keeping in mind the policy and object of the law, and by considering the decisions in cases analogous in point of principle to the present case, that a correct conclusion can be arrived at. A delivery of goods into the custody of an inn-keeper, is not necessary to charge him with them, for although the guest does not deliver them, or acquaint the inn-keeper with them, still the latter is bound to pay for them, if they are stolen or carried away. (1) And if a traveller directs his horse to be put into the stable, and says nothing about the gig in which the horse is harnessed, and the gig and harness are left in a place out of the inn-yard with other carriages and are stolen, the inn-keeper will be held liable for the loss, for the gig will be deemed to be in his custody. (2) So, also, if goods are stolen from the chamber of the guest, although the guest gives no notice that they were left there, he will be responsible for their loss if they are stolen. (3) And although the inn-keeper refuses to take charge of goods for the party until another day, yet if he admits him as a guest into his inn for temporary refreshments, and the goods are stolen while he is there, the inn-keeper will be responsible for the loss, (4) and this seems to be the doctrine of the French as well as the English law. "Pour rendre l'hôte responsable des marchandises et hardes des voituriers ou voyageurs, selon nos moeurs, on a jugé qu'il n'était pas nécessaire qu'elles lui ayent été données en garde ni qu'il les ait vues, ou qu'il sache qu'elles sont entrées dans son hôtellerie, mais qu'il suffit qu'il y ait preuve qu'elles ayent été apportées." (5) And if an inn-keeper goes abroad he must answer for the goods of his guest, for he ought to have a servant to take care of them in his absence. (6) For whoever takes upon himself a public employment must serve

(1) 8 Co., Rep. 32, *Coyle's case*.

(2) 2 Nev. Mann., 576, *Jones vs. Tyler* :—9 Pick., 280, *Mason vs. Thompson*.

(3) 2 Barn. & Adolph. 806, *Kent vs. Shackard*.

(4) 5 T. R. 283, *Bennet vs. Miller*.

(5) Danty, *Traité de la Preuve*, p. 81.

(6) 3 Bacon's *Abridgt.*, p. 182, *in notes*.

the public as far as his employment goes. I notice these decisions, because it is laid down as a rule, that the duties and obligations of inn-keepers, by the common law, apply with equal force to the duties and obligations of carriers by water, (1) and that it may be seen whether by analogy the delivery of the portmanteau on board the steamer "Alliance" in the manner proved, was sufficient to charge the Defendant with the care of it. I can find no consistent rule laid down in the books on this subject, and the application of the doctrine of constructive delivery to such a case is always perplexing. The delivery of commodities into the warehouse of a trader, whether he be present or not, is held to be a complete and real delivery, (2) and goods delivered into a vendee's repository, wherever situate, or of whatever kind, are held as actually delivered. (3) But in order to render a carrier responsible, it is said there must be an actual delivery to him, or to some other person authorized to act on his behalf, (4) and it is admitted to be often a matter of great nicety to decide whether there has been such a delivery or not. To render a man liable for the value of an article, never actually delivered to him, or his servants, and of which he and they could have no knowledge, would seem to me palpably unjust, and I find a case in which it has been decided that if a passenger do not surrender his luggage to the carrier, but take it into his own charge, the carrier is not liable in case of its loss, (5) yet if the thing be tendered to the carrier for conveyance, and he direct the passenger to place it in any part of the vehicle, he will be responsible for its safety. Another case wherein I find the carrier will not be chargeable is where goods are actually put into the wagon or barge of a carrier, and where it appears that there was no intention to trust him with the

(1) Story on Bailmts., No. 438 :—Pothier, Pand, lib. 4, tit. 9 :—1 Domat, B., 1 tit. 16.

(2) Bell's Com. 47

(3) 3 Term Rep. 467.

(4) Story on Bailmts., No. 532.

(5) Story on Contracts, No. 691.

custody ; as where the owner was uniformly in the habit of placing his own servant on board, as a guard, who exclusively took upon himself the management and custody of them ; (1) but the mere fact that the owner or his servant goes with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not of itself exempt him from responsibility. (2)

There can be no uniform set of rules to explain the decisions which are found in the books under the law of bailments, because rules may be diversified to infinity by the circumstances of every particular case, of which it is the province of the Judge or Jury to decide, but I believe that from the application of the spirit and reason of the law, to the facts of the present case, the liability of the Defendant is clearly deducible.

I have come therefore to the conclusion that the Defendant, by placing the steam boat " Alliance " upon the regular line to convey passengers for hire, assumed the duties and liabilities of a common carrier with regard to the passengers' baggage ; that if there was not an actual delivery, there was at all events an implied delivery of the portmanteau into his care, and a sufficient acceptance of it on board the boat, by a man belonging to the boat saying it would be perfectly safe near the ladies cabin door, to charge the Defendant with it—and I am satisfied that the Plaintiff, travelling alone, did no act that manifested her intention of taking exclusive care of the portmanteau, so as to exempt the Defendant from his legal liability as the carrier of it. She may not have known whether it was permissible to have it brought into the ladies' cabin, or she may have doubted the propriety of encumbering the cabin with it. But supposing that she had taken it with her into the cabin, and that it had been there

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(1) 1 Stra., 500, India Company vs. Pullon.

(2) 5 Esp., R. 41, Cobham vs. Downe,

stolen from her whilst she slept, I hold it to be clear law, even in that case, that the Defendant would be accountable for it. But he cannot be permitted to offer as an excuse for its loss, that he did not take charge of it, because there was no person on board specially appointed to take care of the baggage, when it was his duty to have had some faithful person in attendance for that purpose. He, therefore, as owner of the boat, is responsible by the common law for the loss of the portmanteau, occasioned by the want of care and attention on the part of his servants—the maxim *respondet superior* here applies.

**STUART and VANNOVous, for Plaintiff.**

**ALLEYN, for Defendant.**

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**COUR SUPERIEURE.—QUEBEC.**

Présents : **BOWEN, Juge-en-Chef, et MEREDITH, Juge.**

|           |                 |                         |
|-----------|-----------------|-------------------------|
| No. 1101. | FRECHETTE,..... | <i>Demandeur,</i>       |
|           | vs.             |                         |
|           | CORBET,.....    | <i>Défendeur,</i><br>et |

DIVERS, ..... *Opposants.*

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Jugé :—Que la remise d'effets à bord d'une goélette par un débiteur, en consignation à son créancier, sans une vente ou convention préalable à cet effet, n'en transfère pas de suite la propriété ni la possession à tel créancier, et qu'ils peuvent être saisis légalement comme appartenant au consignateur, nonobstant le connaissement qu'en a signé le maître de la goélette, si la saisie a lieu avant qu'ils soient parvenus au consignataire.

Held :—That the placing of goods on board of a schooner by a debtor, addressed to his creditor, without a previous sale or agreement to that effect, does not transfer the property nor the possession to the consignee, and such goods may be legally seized as the property of the consignor, notwithstanding the bill of lading signed by the master of such schooner, if such seizure take place before the goods reach the hands of the consignee.

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**Jugement rendu le 16 Mai, 1855.**

Le Défendeur est à la tête d'un établissement de pêche et de chasse sur l'Isle d'Anticosti. Dans le cours de l'été 1853, il se trouvait dans de grands embarras pécuniaires, et dans l'impossibilité de rencontrer ses obligations ; pour s'acquitter envers Orkney, l'un de ses créanciers, il remit à bord

d'une goëlette une certaine quantité de saumon et autres effets en consignation au dit Orkney, et le maître de la goëlette en donna son connaissance. Arrivé à Québec, le saumon fut saisi à bord de la goëlette par le Demandeur, comme appartenant au Défendeur, et fut revendiqué par Orkney, au moyen d'une opposition afin de distraire, comme étant sa propriété. L'opposition d'Orkney était contestée par plusieurs créanciers du Défendeur, sur le principe qu'il n'y avait pas eu de livraison à Orkney, et que le poisson en question n'avait pas cessé d'appartenir au Défendeur. L'Opposant, Orkney, prétendait que la remise du poisson au maître de la goëlette, qui en avait donné son connaissance, équivalait à une livraison au consignataire, dont le maître était l'agent à cet égard.

La Cour maintint la contestation, et déclara l'opposition afin de distraire non fondée, n'accordant toutefois que les frais d'une seule contestation, quoiqu'il y en eut plusieurs de filées, attendu qu'une seule eût suffi.

MEREDITH, Juge, en rendant le jugement, dit : Les points principaux de cette cause sont, que le 10 Octobre, 1853, le Défendeur consigna à l'Opposant, Orkney, neuf quarts de saumon, par la goëlette Marie Séraphine, alors à l'ancre à la pointe ouest de l'isle d'Anticosti, en partance pour Québec. Le Défendeur devait alors à l'Opposant, Orkney, une somme excédant la valeur du poisson ainsi consigné ; mais il n'appert pas, et il n'est pas prétendu, qu'il y eût une vente ou autre convention entre les parties concernant cet envoi de poisson. La goëlette arriva à Québec un dimanche soir, et le lendemain dans la matinée, la cargaison fut saisie par le Demandeur, comme appartenant au Défendeur. Il n'est pas constaté si l'Opposant, Orkney, avait reçu la lettre contenant le connaissance, lorsque la saisie eut lieu ; du moins il n'appert pas que l'Opposant eut obtenu une délivrance réelle du poisson en question, ni eut rien fait pour en obtenir la possession, avant la saisie.

La question alors qui se présente, est de savoir si sous les circonstances sus-mentionnées, la propriété des neuf quarts de poisson en question était à l'Opposant, avant la saisie du Demandeur ; dans mon opinion, cette question doit être résolue dans la négative. S'il était intervenu un contrat de vente, ou aucune autre convention translative du droit de propriété entre les parties, par la livraison des effets au maître du vaisseau, la propriété des effets consignés aurait passé à l'Opposant. Mais en l'absence d'un tel contrat, la seule livraison des effets entre les mains du commissionnaire, *common carrier*, et la signature du connaissance en faveur de l'Opposant, ne peuvent avoir l'effet de lui en transporter la propriété. Le savant conseil de l'Opposant a cité *Abbott on Shipping* : et le passage de cet auteur sur lequel il se repose, est le suivant, je crois :— “ When bills of lading . . . . . , by which goods are deliverable to a consignee by name, are transmitted to him as security for antecedent advances, . . . . . they are evidence of such a destination and appropriation to him of the specific goods, as will vest in him a property absolute or special in them, at the time of their delivery on board, and so render the master responsible to him, for their loss or injury.” (1) Ce passage ne prouve pas qu'en aucun temps, suivant les lois anglaises, le droit de propriété dans des marchandises mentionnées dans un connaissance, doit passer au consignataire au préjudice des autres créanciers du consignateur ; et quelle que soit à cet égard la loi en Angleterre, suivant notre droit, un débiteur ne peut pas transporter, de la manière mentionnée dans le passage cité d'Abbott, tous les biens à l'un de ses créanciers au préjudice des autres. Pour ces raisons, la cour est d'opinion que le saumon en question a été bien saisi sur le Défendeur, et que l'opposition afin de distraire doit être renvoyée avec dépens.

**ALLEYN**, pour Orkney.

**O'FARRELL**, pour Perron et autres.

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(1) *Abbott on Shipping*, pp. 333, 410 of 5th Am. Ed. by Perkins.

## SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MEREDITH and BADGLEY,  
Justices.

No. 1601. { WURTELE et al. .... Plaintiffs.  
 vs.  
 { PRICE ..... Defendant.

Held:—That an affidavit for *Saisie-Arrêt* in which it is said: "That Deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, that the Defendant is immediately about to secrete his estate, debts and effects with intent to defraud, &c.," is sufficient.

Jugé:—Qu'un affidavit pour *Saisie-Arrêt* dans lequel il est dit "Que le Déponent est informé d'une manière crovable, à toute raison de croire, et croit vraiment dans sa conscience, que le Défendeur est sur le point de récélérer ses biens, dette, et effets dans la vue de frauder, &c.," est suffisant.

Judgment rendered the 3rd March, 1855.

A Writ of *Saisie-Arrêt* issued in the cause, upon the return of the Writ the Defendant moved to quash the *Saisie-Arrêt*, upon the ground that there was no proof on oath that the Defendant was about to secrete his effects with intent to defraud the Plaintiffs.

The affidavit upon which the Writ issued, after alleging the indebtedness and cause of debt, set forth:

"That Deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, that the said William Price is immediately about to secrete his estate, debts and effects, with an intent to defraud his creditors, and the said C. and W. Wurtele in particular."

The motion to quash alleged, "That no affidavit was made in manner and in the terms required by law to justify the issuing of the said Writ:"

"That there was no proof on oath, previous to the issuing of the Writ of *Saisie-Arrêt*, that the Defendant was about to secrete his estate, debts and effects with an intent to defraud his creditors."

**STUART, OKILL :** In support of the motion contended that by the 27th Geo. III, Cap. 4, sec. 10, it was necessary to swear positively "That the Defendant was about to secrete his estate, debts and effects," and not merely to swear "that Deponent was credibly informed, had every reason to believe, and verily in his conscience did believe, &c." ; that according to the Statute above cited this was no proof at all, and that therefore the Writ of *Saisie-Arret* issued in the cause, should be set aside and quashed.

**ANGERS :—**In shewing cause against the motion maintained that in the affidavit in the cause, the provisions of the Statute above cited were complied with ; that by the 9th Geo. IV, Cap. 27, the Legislature itself had put its own interpretation upon the first mentioned Statute, by prescribing a form of affidavit to be used for the issuing out of Writs of *Saisie-Arret*, and that the affidavit in the present cause was an exact transcript of the form of affidavit in question, and therefore must be held sufficient.

**Judgment :**

The Court having seen and examined the proceedings of record, and heard the parties by their Counsel, respectively, upon the rule of the seventh day of February last, granted to the Defendant upon his motion to quash the Writ of Attachment or *Saisie-Arret* in this cause issued, for the reasons in the said motion mentioned, doth consider and adjudge that the said rule be and the same is hereby discharged. (1)

**LELINEK and ANGERS, for Plaintiffs.**

**STUART, G. OKILL, for Defendant.**

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(1) 4 L. C., Rep. p. 49, Shaw vs. McCune :—Ante p. 195, Laing vs. Brester.

## SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MEREDITH and MORIN,  
Justices.

No. 1478. { BAILE,.....,.....,..... Plaintiff.  
                  { NELSON et al.....,.....,..... Defendants.

Held:—That an affidavit for *saisie-arrêt* in which it is said: “ That Deponent hath every reason to believe, and doth verily believe that the Defendants are immediately about to secrete their estate, debts and effects with intent to defraud, &c.” is insufficient, and not in accordance with the 27th Geo. III, Cap. 4, or the form prescribed by the 9th Geo. IV, Cap. 27.

Jugé:—Qu'un affidavit pour *saisie-arrêt* dans lequel il est dit: “ Que le Déposant a raison de croire, et croit vraiment que les Défendeurs sont sur le point de récéler leurs biens, dettes et effets dans la vue de frauder &c.,” n'est pas suffisant, et n'est pas conforme aux dispositions de la 27e Geo. III, Cap. 4, ou la forme prescrite en la 9e Geo. IV, Cap. 27.

Judgment rendered 3rd March, 1855.

The case was heard upon a motion by Gale and Hoffman, two of the Defendants, to quash the Writ of *saisie-arrêt* in the cause issued, and the attachment made under the same, upon the ground, that the affidavit upon which the Writ issued did not contain sufficient proof that the Defendants were about to secrete their estate, debts and effects.

The affidavit after alleging the indebtedness, and cause of debt, set forth—

“ That this Deponent hath every reason to believe, and doth verily believe, that the said Defendants are immediately about to secrete their estate, debts and effects, with intent to defraud, &c.”

The motion to quash was made upon the ground that the affidavit did not contain due proof that the Defendants were about to secrete their estate, debts and effects, in the manner and form required by the Statute 27th Geo. III, Cap. 4, sec. 10.

**AUSTIN** : In shewing cause against the motion contended that all that was required by the Statute above cited was, that there should be due proof on oath, to the satisfaction of one Judge, that the Defendants were about to secrete their estate, debts and effects with an intent to defraud, &c. that the ground upon which the Plaintiff in this cause founded his said belief was, that in an affidavit filed and of record in a case in this Court, the case of Galbraith vs. Nelson *et al.*, it was alleged that the Defendants in this cause were about to secrete their estate, debts and effects with an intent to defraud their creditors, &c. ; that therefore the Plaintiff in this cause was justified in entertaining his said belief, and that the grounds of his belief as above mentioned, were sufficient to warrant the issuing of a Writ of *Capias ad Respondendum*, and consequently should be held sufficient to sustain a Writ of *Saisie-Arrest* and Attachment made in virtue thereof.

**ANDREWS** : In support of the motion maintained that the 10th section of the 27th Geo. 3, Cap. 4, required that in the affidavit for a Writ of *Saisie-Arrest* it should be positively alleged, that the Defendant was about to secrete his estate, debts and effects ; that it was not sufficient to allege that Deponent had every reason to believe and verily did believe, and assign the grounds of his belief, but that the Deponent should positively swear that the Defendant was about to secrete, &c. ; that the affidavit in the case, contained no such allegation, the Writ of *Saisie-Arrest* should therefore be quashed.

**MEREDITH, Justice** : The affidavit in this case is in the form given by the 9th Geo. IV, Cap. 27, excepting that the words, " that he had been credibly informed," are omitted, the allegation in the affidavit being, " That this Deponent hath every reason to believe and doth verily believe, &c."

The Court holds the affidavit insufficient, as not being in accordance with the words of the 27th Geo. IV, Cap. 4, and the form given in the 9th Geo. IV, Cap. 27, and which has been generally used, even since that Act has ceased to be in force.

"The Court, &c. considering that the affidavit of the Plaintiff, upon which the said Writ of *Saisie-Arret* or *entierrement* was sued out, was insufficient to justify the issuing of the same :—It is in consequence ordered and adjudged that the attachment made under the said Writ of *Saisie-Arret*, in the hands of the *tiers-saisie* James Maclaren, be, and the same is hereby quashed, and declared null and void, with costs against the Plaintiff and in favor of the said Defendants, John Valiant Gale and Andrew William Hoffman : which costs are hereby awarded to Messrs. Andrews and Campbell, as Attorney for the said John Valiant Gale and Andrew William Hoffman.

AUNTYN, F. W. G., for Plaintiff.

ANDREWS and CAMPBELL, for Defendants.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents : Sir L. H. LAFONTAINE, Baronet, Juge-en-Chef,  
DUVAL, CARON et MEREDITH, Juges.

|                                                                                                                                          |                                                  |
|------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|
| <b>TREMBLAY.....</b><br><b>LA COMPAGNIE des Propriétaires du</b><br><b>Chemin à Lisses du Champlain et</b><br><b>du St. Laurent.....</b> | <i>Appelant,</i><br><i>et</i><br><i>Intimée.</i> |
|------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|

Jugé :—1. Que dans le Bas-Canada, les notaires ont le droit de recevoir les sentences arbitrales et délivrer des expéditions authentiques d'elles sentences, ainsi que du certificat de prestation de serment des arbitres qui peut y être attaché, que nommément tel pouvoir leur est reconnu par les Actes des 2 Guil. IV, ch. 58, et 13 et 14 Vict. ch. 114.

2. Que la liquidation des dépens par les arbitres nommés sous l'opération des Actes sus-mentionnés ne vici pas le rapport.

Held :—1. That in Lower Canada Notaries have the power to receive the report of arbitrators and to give certified copy of the swearing in of the arbitrators annexed thereto, and that such power is specially recognized as belonging to them by the Statutes 2 Will. IV, ch. 58, and 13 and 14 Vict. ch. 114.

2. That the assessment of costs by arbitrators named under the provisions of the Statutes above mentioned does not vitiate their report.

Sir L. H. LAFONTAINE, Baronet, Juge en-Chef : La compagnie dont l'existence remonte à l'année 1832, (1) a été autorisée, par un acte de la législature, passé en l'année 1850, (2) à prolonger de St. Jean à la frontière, dans la direction de Rouse's Point, dans l'Etat de New York, les chemins à lisses qu'ell eavai déjà faits de Laprairie à St. Jean, et d'en étendre les parcours, par un embranchement dans la direction opposée, jusqu'à St. Lambert, vis-à-vis de Montréal.

Cette loi lui donne le droit d'acquérir, soit à l'amiable, soit par expropriation, moyennant une indemnité préalable, les terrains dont la possession lui est nécessaire, et dont elle a seule le choix. Lorsque les parties ne s'accordent pas sur le chiffre de l'indemnité, il y a lieu à un arbitrage, et voici comment on procède. La compagnie fait signifier au propriétaire, un avis contenant—1. la désignation du terrain qu'elle veut prendre ; 2. l'offre de la somme précise qu'elle en-

(1) 2 Guil. IV, ch. 58.

(2) 13 et 14 Vict. ch. 114.

tend lui payer comme indemnité ; et 3. le nom de la personne dont elle fait choix pour agir comme son arbitre, dans le cas où son offre ne serait pas acceptée. Cet avis doit être accompagné du certificat d'un arpenteur, déclarant, entr'autres choses, que la somme offerte par la compagnie forme une juste indemnité. (1) Dans le cas actuel, toutes ces formalités ont été remplies ; l'avis donné à l'Appelant, et le certificat de l'arpenteur Perrault, portant date du 25 Avril, 1851 ; la somme offerte, comme indemnité, est de £27 11 8, et Mr. James Somerville est l'arbitre nommé par la compagnie.

De son côté, le propriétaire s'il refuse la somme ainsi offerte et désire nommer lui-même un arbitre, doit faire le choix de cet arbitre sous trois jours après la signification de l'avis susdit, et, dans le même délai, en faire notifier le nom à la compagnie. Les deux arbitres ainsi nommés doivent choisir un tiers arbitre ; s'ils ne s'accordent pas sur ce choix, le tiers arbitre est nommé par un juge de la Cour Supérieure, sur requête de l'une ou de l'autre des parties. (2)

L'Appelant n'ayant pas accepté l'offre de la compagnie a fait choix de M. François Bourassa pour son arbitre ; choix constaté par acte passé devant notaires, le 28 Avril, 1851, et signifié le lendemain à la compagnie par l'huissier Miller. Cette signification a, en outre, été reconnue par M. Merry, le trésorier-secrétaire de la compagnie.

Les deux arbitres des parties se sont accordées sur le choix du tiers arbitre, ils ont nommé M. Edward Quinn.

Le rapport ou la sentence des trois arbitres, adopté à l'unanimité, est en date du 10 Sept. 1851 ; et est reçu en langue anglaise, par acte devant Thomas R. Jobson, notaire, et son confrère ; et fixe l'indemnité que la compagnie doit payer, à la somme de £44 2 10 " avec la somme additionnelle de " £26 pour les frais et dépens du dit arbitrage, payable

(1) 13th and 14th Vict., ch. 114, s. 21, § 3.

(2) 13th and 14th Vict., ch. 114, s. 21, § 6.

"comme suit : au dit James Somerville £6 ; au dit François Bourassa £12 ; et au dit Edward Quinn £6 ; et £2 " à qui il appartiendra pour la rédaction, l'exécution et la " signification du rapport ;" c'est-à-dire, £2 au notaire Jobson, qui l'a reçu et en a gardé la minute.

L'action de l'Appelant avait pour objet de faire condamner la compagnie à lui payer ; 1. la susdite somme de £44 2 10 montant de l'indemnité adjugée par la sentence arbitrale ; 2. la somme de £12 pour M. Bourassa, son arbitre, et celle de £2 pour le notaire Jobson.

Une défense au fonds en droit, présentée en premier lieu par les Intimés, fut déboutée. Cette défense était suivie de trois exceptions préemptoires, et d'une défense au fonds en fait. La première exception invoquait la nullité de la sentence des arbitres, résultant, disait-on, de ce que ceux-ci, sans en avoir reçu le pouvoir, ni de la loi, ni du consentement des parties, avaient pris sur eux d'adjuger et taxer les dépens de l'arbitrage, tandis que par le statut en question cette liquidation des dépens, en l'absence d'accord entre les parties sur leur montant, devait être faite par un juge de la Cour Supérieure ; dans la deuxième exception les Intimés répétaient les mêmes moyens de nullité, ajoutant que la mission des arbitres était seulement d'évaluer le terrain dont l'Appelant devait être exproprié par la compagnie, et qu'en adjugeant et taxant les dépens, comme ils l'avaient fait, les arbitres avaient outre-passé leurs pouvoirs, ce qui, disaient les Intimés, avait eu l'effet de frapper de nullité la sentence arbitrale ; la troisième exception articulait—1. défaut de prestation, par les arbitres, du serment requis par le statut ; 2. défaut d'avoir aux Intimés, des procédés ou des assemblées des arbitres ; 3. non prestation, par les témoins, du serment requis par la loi ; 4. absence d'accord entre les parties sur le montant des dépens, et non taxation de ces dépens par un juge de la Cour Supérieure ; 5. irrégularité, illé

galité et nullité (alléguées d'une manière générale) de tous les autres procédés des arbitres ; 6. adjudication de dommages et dépens excessifs.

Le jugement de la Cour de première instance, qui déboute l'Appelant de son action, a été rendu le 13 Avril, 1853 ; les motifs en sont, en substance, que la copie notariée (produite en cette cause) de la sentence des arbitres et de leur prestation de serment, ne pouvait faire preuve légale ni de l'une ni de l'autre, attendu que les notaires en ce pays n'ont point qualité pour recevoir et certifier une telle sentence et un tel serment, et pour en garder l'original au nombre de leurs minutes.

Les Intimés n'ont fait aucune preuve à l'appui de leurs moyens de contestation. Le sort de la cause dépend donc de la preuve faite par l'Appelant.

Le statut de 1850, sect. 21, § 7, impose aux arbitres l'obligation de prêter "devant l'un des commissaires préposés à la réception des affidavits dont il est permis de faire usage dans la Cour Supérieure, serment de remplir fidèlement et impartialement les devoirs de leur charge." Le notaire Jobson, étant un de ces commissaires, a, en cette qualité, et non en celle de notaire, administré aux trois arbitres le serment requis par la loi ; il a, en la même qualité de commissaire, rédigé un acte, ou certificat, de cette prestation de serment, lequel acte est signé de lui et des arbitres, et porte la date du 29 Juillet, 1851. Plus tard, savoir le 10 Septembre de la même année, M. Jobson, en sa qualité de notaire, a reçu la sentence arbitrale dont il s'agit, et en a gardé la minute. Dans cette sentence, les arbitres déclarent eux-mêmes "avoir dûment prêté serment devant Thomas R. Jobson, commissaire pour recevoir les affidavits, &c. &c., le 29 Juillet alors dernier, ainsi qu'il appert par certificat à cet effet, demeuré annexé à la minute des présentes" c'est-à-dire, à la minute de la dite sentence arbitrale.

A l'appui de son action, l'Appelant a produit une copie ou expédition notariée (c'est à dire duement certifiée par M. Jobson, en sa qualité de notaire dépositaire de la minute), de la sentence arbitrale et de la prestation de serment. C'est cette copie notariée que les premiers juges ont regardée comme ne faisant pas preuve légale. La question est donc de savoir si cette sentence pouvait être reçue par-devant notaire, et si l'acte de la prestation du serment pouvait être annexé à la minute de la sentence, de manière à en faire partie ? Si cette question est résolue dans l'affirmative, il s'ensuivra que la copie notariée, produite par l'Appellant, est revêtue du caractère de l'authenticité, et, par conséquent, fait preuve légale de la sentence arbitrale et du serment.

Je dois d'abord faire observer que le statut de 1850 ne prescrit aucune forme sacramentelle pour la rédaction des avis ou notifications que les parties peuvent se donner réciprocement, non plus que pour celle de la nomination des arbitres, de la prestation de serment et de leur sentence ; qu'il ne fixe aucun temps pour l'opération et le rapport des arbitres, excepté en un seul cas, celui où le tiers-arbitre est nommé par un juge de la Cour Supérieure, lequel juge doit, en faisant cette nomination, fixer le temps pendant lequel le rapport doit être fait ; que le statut garde le silence sur la dénonciation à faire aux parties, de la sentence arbitrale, le législateur n'ayant peut-être pas voulu reconnaître la nécessité de cette formalité ; que le dernier paragraph de la 21<sup>e</sup> section déclare que "no award made as aforesaid shall be invalidated by any want of form or other technical objection, if the requirements of this Act shall have been complied with, and if the award shall state clearly the sum awarded, and the lands or other property, right or thing for which such sum is to be the compensation ; nor shall it be necessary that the party or parties to whom the sum is to be paid, be named in the award."

Dans le cas où la sentence serait rédigée par les arbitres eux-mêmes, si elle ne peut être déposée chez un notaire, où le sera-t-elle, si le statut de 1850 garde le silence, et sur la manière de faire ce dépôt, et sur le lieu où il doit être fait ? Les fonctions des arbitres sont terminées avec leur rapport ; et si un notaire n'a point qualité, d'un côté, pour recevoir ce rapport en minute, de l'autre, pour en recevoir le dépôt et en donner acte aux arbitres, lorsque ceux-ci l'ont rédigé eux mêmes, il s'en suivra que personne n'en aura la garde, et que, par conséquent, personne ne pourra en délivrer des copies ou expéditions authentiques. Cependant, comme je le ferai voir plus tard, le statut, dans sa 23<sup>e</sup> section, parle d'une copie authentique de ce rapport.

Est-il bien vrai de dire que les notaires, dans le Bas Canada, n'ont point qualité pour recevoir les sentences arbitrales, ainsi que l'a décidé la Cour de première instance ? Si nous consultons nos livres sur l'ancien droit français, tant antérieur que postérieur à l'établissement du Conseil Supérieur de Québec en l'année 1663, il nous sera facile, ce me semble, de nous convaincre qu'en France, les notaires avaient la faculté, non seulement de passer les compromis des parties, mais encore de recevoir, soit en minute, soit en dépôt, les sentences de leurs arbitres, et d'en délivrer des expéditions. Dans le cas actuel, les parties, il est vrai, n'avaient pas fait de compromis par devant notaires, quoiqu'elles eussent pu le faire, le statut ne leur ayant pas interdit le pouvoir d'en faire un à l'amiable, mais il n'en existait pas moins un compromis entr'elles ; ce compromis était dans la loi même, le statut de 1850 l'ayant fait pour elles ; et les arbitres qui ont rendu la sentence dont il s'agit, n'en étaient pas moins les arbitres des parties, choisis par elles-mêmes.

Il y a bien eu en France, à une certaine époque des "grefiers des arbitrages," auxquels on avait donné la faculté de recevoir, à l'exclusion des notaires, les compromis, les sen-

tences des arbitres et quelques autres actes ; mais ces officiers publics n'ont jamais été transplantés en Canada, et, par conséquent, nos notaires n'ont pas pu être privés du droit, dont leurs confrères, en France, étaient en possession avant la création de ces " officiers," de recevoir les sentences arbitrales. Les " Greffiers des arbitrages " avaient été établis par un Edit du mois de Mars, 1673, qui est rapporté tout au long dans le " Traité des Droits des Notaires " de Langloix, à la page 51 de son " Recueil des Chartres, tit. 1, " Lettres-Royaux." Cet Edit donnait en effet à ces officiers le pouvoir de recevoir les sentences arbitrales, à l'exclusion des notaires ; mais cette loi était une loi nouvelle ; et par cela même qu'elle était ce pouvoir aux notaires, elle reconnaissait que ceux-ci en étaient en possession avant sa promulgation, et qu'ils l'avaient exercé jusque là. Or cet Edit n'ayant pas été enregistré au Canada, il n'a pu affecter le droit de nos notaires de recevoir les sentences des arbitres et d'en délivrer des expéditions. Du reste ces charges de " Greffiers des Arbitrages " furent bientôt rachetées dans la plupart des sièges, soit par les notaires, soit par les Greffiers des Justices Royales. Un Edit du mois d'Août de la même année, 1673, abolit celles qui avaient été créées pour Paris, et les fonctions qui y avaient été attachées, par l'Edit de leur création, furent de nouveau exercées par les notaires. (1) " Que les notaires,"

(1) 2 Nouv. Denisart, vbo. Arbitrage, § 3, p. 242, No. 3 :—l Pigeau, pp. 20 et 26 :—Langloix, ch. 6, pp. IX et X.

Il y avait " vingt offices de Greffiers héréditaires," créés par l'Edit de Mars, 1673, pour la ville et faubourgs de Paris, dit Langloix ; par Edit du mois d'Août de la même année, le Roi, " ayant mis en considération la possession immémoriale où étaient les 113 Notaires du Châtelet de Paris, des fonctions attribuées, tant concurremment qui privativement, aux dits greffiers, . . . éteignit et suprima le titre des dits vingt offices. . . . et Sa Majesté réunit et incorpora aux dits 113 Notaires du Châtelet de Paris, et à chacun d'eux et leurs successeurs en leurs offices à perpétuité, toutes les fonctions attribuées aux dits vingt offices de greffier." Puis, Langloix, ajoute : " Les notaires ont payé pour cette réunion quatre cent cinquante-deux mille livres de finance principale, des deniers par eux empruntés " à cet effet, et dont ils paient rente encore actuellement." Extrait de l'édition de 1738.

L'on trouve à la page 346 du 2d Vol : de nos " Edits et Ord : Royaux," des provisions du Roi de France, en date du 18 Mai, 1675, (c. a. d, deux ans après les

dit Langloix, "fussent avant cette réunion, en possession des fonctions attribuées aux dits Greffiers, on en voit la preuve dans un arrêt du Parlement du 4 Mars, 1662."

"L'Acte qui contient la sentence arbitrale," dit le Nouv. Denisart au mot "arbitrage," p. 243, sous le No. 6, "est écrit entièrement par les Notaires auxquels les arbitres en personne dictent leur sentence." Puis l'on donne une formule de cet acte, lorsque la sentence arbitrale est reçue en minute par un notaire. (1)

Pigeau, t. 1, p. 25 : "Après ce contrôle," (lorsque le juge-  
ment des arbitres était sujet au contrôle, ce qui n'était pas  
le cas, lorsqu'il était reçu par un Notaire de Paris) ; "on le  
dépose chez un Notaire." Ceci avait lieu quand les  
arbitres avaient eux-mêmes rendu leur jugement, sans  
avoir recours au Notaire pour le rédiger en minute. "Ce  
dépôt," dit Pigeau, "se fait par les arbitres eux-mêmes, et  
le Notaire en dresse un acte".... "Le dépôt étant fait on  
pense que le jugement doit être prononcé aux parties"....  
"Cette prononciation se fait ordinairement par le Greffier  
des arbitrages, ou le Notaire dépositaire de la sentence,  
aux parties qui vont chez lui, et si elles ne le font, il se  
transporte chez elles et leur en fait lecture."

Ferrière, Science des Notaires, t. 2, p. 428. Edition de 1771, antérieure aux deux Edits concernant l'office de "Greffier des arbitrages," donne une formule d'un acte d'apport ou dépôt d'une sentence arbitrale, "mis au pied d'icelle," chez un Notaire pour la garder en ses minutes, la prononcer aux

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deux Edits de 1673,) octroyant à M. Giles Rageot, "un des offices de notaire  
garde notes, en la juridiction de la dite ville de Québec en la Nouvelle France,  
pour le dit office avoir, tenir et exercer conformément à la Coutume, Prévôté et  
Vicomté de Paris, et en jouir et user aux honneurs, autorités, prérogatives, fran-  
chises, gages, droits, profits, revenus et émolumens au dit office appartenant."

(1) 1 Pigeau, pp. 25 et 26 :—Guyot, Repert. de Jur. vbo. Arbitre, p. 551.

parties aussi y nommées, et en délivrer des expéditions à qui il appartiendra, dont acte, etc. etc."

Il me semble donc qu'il ne peut exister de doute sur la faculté que nos Notaires ont, par les anciennes lois françaises, de recevoir les sentences arbitrales. Ils n'en ont été privés par aucune loi particulière au Bas Canada. M. Jobson, comme Notaire, avait donc le pouvoir de recevoir la sentence dont il s'agit en cette cause, si, dans le cas actuel, l'exercice de ce pouvoir n'a pas été interdit aux Notaires par les statuts qui régissent la Compagnie des Intimés. Ces statuts, loin de décréter une pareille interdiction, contiennent, à mon avis, une reconnaissance formelle de la faculté des Notaires de recevoir les sentences arbitrales qui concernent les Intimés.

L'existence de la Compagnie repose sur l'Acte de 1832, ch. 58, suivi de deux ou trois autres Actes de la Législature, antérieurs à la promulgation de celui de 1850, ch. 114 "Toutes les dispositions" de ces premiers Actes, sont déclarées, par la 25e section du dernier, et ce "en autant que celui-ci ne contient pas de dispositions spéciales au contraire," être applicables, comme devant les régir, à l'embranchement et à la continuation du chemin, qui doivent être pratiqués sous l'autorité du nouvel Acte," tout de même que si cet embranchement et cette continuation eussent été faits sous l'autorité des premiers."

Des difficultés semblables à celle qui a donné lieu à un arbitrage entre l'Appelant et les Intimés, pouvaient, sous l'opération de l'acte de 1832, Sect : 12, être également réglées par des arbitres, ou bien par le verdict ou jugement d'un jury spécial. Puis la 16e section de cette Acte porte que "tous marchés, ventes et transports, et toutes décisions d'arbitres comme susdit, ou copies notariées d'iceux, lorsqu'ils "seront passés par devant Notaires, seront transmis au Pro-

" tonotaire de la Cour du Banc du Roi pour le District de  
 " Montréal, pour être par lui gardés parmi les archives de la  
 " dite Cour, et seront pris et regardés comme étant records  
 " de la dite Cour à toutes fins et intentions, et iceux ou  
 " copies conformes d'iceux seront considérés comme preuve  
 " valable dans toutes Cours quelconques en cette Province."

Les mots ci-dessus rapportés " copies notariées d'iceux,  
 " lorsqu'ils seront passés devant Notaires," lesquels, comme  
 on le voit, comprennent *toutes décisions d'arbitres*, démontrent  
 jusqu'à l'évidence que le Législateur, dans sa loi de 1832, a  
 reconnu et confirmé le pouvoir des Notaires en ce pays de  
 recevoir les sentences arbitrales, celles mêmes qui concer-  
 naient la Compagnie des Intimés, et d'en délivrer des expé-  
 ditions ou copies notariées, c'est à dire authentiques. Si, de  
 ce que le statut de 1850 garde le silence sur le dépôt à faire  
 des Actes et des sentences arbitrales qui peuvent avoir lieu  
 sous son autorité, l'on pouvait prétendre qu'il a été dérogé à  
 la disposition ci-dessus citée du statut de 1832, cette dérogation  
 ne porterait tout au plus que sur la nécessité de ce dépôt, et  
 non sur le pouvoir des Notaires de recevoir ces Actes et ces  
 sentences arbitrales. Il y a plus ; c'est que ce pouvoir des  
 Notaires est, sinon formellement, du moins virtuellement  
 reconnu par la 23e section du statut de 1850. Cette section  
 autorise la Compagnie à demander des lettres de ratification  
 de son titre, en suivant certaines formalités particulières, et,  
 lorsqu'il y a sentence arbitrale, elle déclare que cette sentence  
 est le titre de la Compagnie à la propriété du terrain, auquel  
 terrain l'indemnité accordée par les arbitres est substituée  
 pour l'exercice des hypothèques des créanciers.

Lorsque la Compagnie veut obtenir des lettres de ratifi-  
 cation d'une sentence arbitrale, cette 23e section de la loi  
 exige qu'elle délivre au Protonotaire de la Cour Supérieure,

non l'original, mais bien "une copie authentique" de cette sentence ; ce qui fait nécessairement présumer que l'original doit être en la possession ou garde de quelqu'officier public, (autre que le dit Protonotaire,) qui a qualité pour le recevoir soit en minute soit en dépôt, et qui a, de même, qualité pour en délivrer des copies authentiques. Quel pourra donc être cet officier, si ce n'est pas un Notaire ? Le doute sur ce point ne sera plus permis, si l'on fait le rapprochement de ces mots "copie authentique" du statut de 1850, et de ceux ci, "copies notariées d'iceux, lorsqu'ils seront passés par devant Notaires," qui se trouvent dans le statut de 1832.

Quant au serment des arbitres, si la déclaration qu'ils font, dans leur sentence, de la prestation de ce serment, n'est pas suffisante, et qu'il soit nécessaire, nonobstant le dernier paragraphe ci-dessus rapporté de la 21e section du statut de 1850, que le Commissaire des Affidavits leur donne un certificat de cette prestation, pour, au besoin, en constater l'existence, bien que le statut n'en parle pas, il me semble tout naturel que, dans ce cas, le certificat accompagne la minute de la sentence arbitrale et en fasse partie, et que les arbitres, dont les fonctions sont terminées avec leur rapport, ne sauraient déposer valablement ce certificat ailleurs que chez le Notaire qui a la garde de leur rapport, pour ne faire l'un et l'autre qu'un seul tout, un seul et même Acte, dont le Notaire a qualité pour délivrer des expéditions ; et jusqu'à inscription de faux, ces expéditions doivent être regardées comme faisant foi de leur contenu, tant à l'égard du serment des arbitres que de leurs sentences. Je suis donc d'avis que la nullité que proclame le jugement de la Cour de première instance, n'existe pas. Il ne sera peut être pas hors de propos de remarquer ici que cette prétendue nullité de la sentence arbitrale, résultant, dit-on, de sa réception par-devant notaires,

n'a pas été plaidée spécialement dans les exceptions des Intimés.

Supposant qu'il y ait eu nullité, on pourrait peut être encore répondre que, dans les circonstances particulières de cette cause, la Compagnie doit être censée avoir acquiescé à la sentence arbitrale, et que cet acquiescement a eu l'effet de couvrir la nullité dont il est question. Dans l'avis du 25 Avril, 1851, donné à l'Appelant, la Compagnie lui intime qu'elle est sur le point de prendre son terrain sur lequel elle lui laissera un passage à l'endroit qu'il choisira lui-même, choix qu'il devra notifier à la Compagnie dans dix jours après que celle-ci aura pris possession du terrain. Aux termes de la 22e section du statut de 1850, la Compagnie n'a pu avoir de titre à la propriété et à la possession du terrain de l'Appelant que par la sentence arbitrale qui devait suivre son avis du 25 Avril ; encore ne pouvait-elle avoir cette propriété et cette possession que par le paiement préalablement fait de l'indemnité accordée par cette sentence, ou à la suite d'offres réelles du montant de cette indemnité. La Compagnie n'a fait ni paiement ni offres réelles. Cependant elle s'est mise en possession du terrain, elle en jouit sans avoir d'autre titre pour justifier cette prise de possession, cette jouissance, que la sentence arbitrale dont il s'agit. Ne peut-elle pas être censée, par ce fait là seul, avoir acquiescé à cette sentence. Nier cet acquiescement, et soutenir en même temps la nullité de la sentence, n'est-ce pas, de sa part, avouer qu'elle n'est pas propriétaire du terrain et qu'elle n'en a qu'une possession illégale ? La Compagnie, il est vrai, aurait pu, même avant la sentence arbitrale, se mettre légalement en possession du terrain, au moyen d'un mandat de prise de possession ; mandat qu'après l'avis de la nomination de son arbitre, elle pouvait obtenir d'un juge de la Cour Supérieure, en remplissant les conditions exigées en pareil cas par le *proviso* qui se trouve à la fin de la 22e section du statut de 1850. Mais ce

n'était là qu'un privilége, un droit exceptionnel, qui ne pouvait être acquis que par l'accomplissement de ces formalités, et qui, d'après sa nature même, aurait dû être spécialement invoqué, et, de plus, prouvé. Les Intimés n'ont fait ni l'un ni l'autre. Dans une de leurs exceptions, ils ont dit que l'indemnité adjugée par les arbitres était excessive ; ils ne l'ont point prouvé, ils n'ont pas même, en défendant à l'action de l'Appelant, offert de lui payer une indemnité quelconque, bien qu'ils retiennent la possession et la jouissance de son terrain.

Je crois qu'il ne reste plus que deux autres objections à considérer. Elles sont bien faibles. La première est que les arbitres n'ont pas donné aux Intimés avis de leurs procédures ou de leurs assemblées. D'abord il est prouvé que M. James McDonald avait pouvoir de la Compagnie de la représenter à tous les arbitrages qui avaient lieu sous l'autorité du statut de 1850, et qu'il l'a représentée à l'arbitrage dont il s'agit en cette cause. Il est à propos de faire remarquer en passant, qu'il n'est point prouvé qu'en cette occasion, M. McDonald ait objecté à l'opération des arbitres, à raison du défaut de prestation de serment de leur part. Ensuite le 7e paragraphe de la 21e section du statut, dispense les arbitres, en termes exprès, de donner à l'une ou l'autre des parties l'avis qui, suivant la prétention des Intimés, aurait dû leur être donné, et les autorise à procéder à établir l'indemnité, de la manière qu'ils jugeront le plus convenable de le faire.

Quant à l'objection relative aux dépens de l'arbitrage ; je dois faire remarquer qu'en cette matière, il y a deux choses distinctes, il y a l'adjudication, et il y a la taxation ou liquidation des dépens. D'après l'article 2 du titre 31 de l'Ordonnance de 1667, les arbitres ont le pouvoir de condamner aux dépens ; cet article leur en faisait même une obligation ; cependant il paraît qu'il était d'un usage assez ordinaire pour les arbitres de les compenser. (1) L'article est

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(1) Nouv. Denisart, vbo. Dépens, § 2, No. 1, p. 233.

en ces termes : " seront aussi tenus les arbitres, en jugeant " les différends, de condamner indéfiniment aux dépens " celui qui succombera, si ce n'est que par le compromis il y " eût clause expresse portant pouvoir de les remettre, modérer " ou liquider." Et les auteurs, entre autres, ceux du Nouveau Denisart, au mot Dépens, p. 233, nous disent que " pour " éviter les frais de taxe, il est de la prudence des arbitres de " taxer les dépens par leur jugement."

Le statut de 1850, au 8<sup>e</sup> paragraphe de la 2<sup>e</sup> section, a une disposition expresse sur la condamnation et la taxation ou liquidation de dépens d'un arbitrage fait sous son autorité. Quant à la condamnation, elle est absolue ; elle est d'avance prononcée contre la partie qui succombera sur la contestation. Le compromis que la loi a fait pour les parties ne laisse aux arbitres aucune discrétion à cet égard. Le statut porte que si l'indemnité adjugée par les trois arbitres est moindre, ou n'est pas plus forte que celle offerte par la Compagnie, les dépens de l'arbitrage seront mis à la charge de l'autre partie, et déduits du montant de l'indemnité ; et que, dans le cas contraire, les dépens seront payés par la Compagnie. En cela, la disposition du statut est conforme à la lettre de l'Ordonnance de 1667 ; c'est la partie qui succombe qui est condamnée aux dépens. Dans le cas actuel, c'est la Compagnie qui a succombé. Elle était donc de plein droit condamnée aux dépens ; et si les arbitres, par leur sentence, eussent formellement prononcé contre la Compagnie une condamnation de dépens, cela n'aurait pu donner lieu d'arguer de nullité cette sentence, car, en réalité, ce n'eût été que faire l'énoncé d'une condamnation déjà prononcée par la loi. Au reste cette nullité, si nullité il y eût eu, n'aurait pu porter que sur cette partie de la sentence prononçant la condamnation aux dépens. Il n'y a pas dans le rapport des arbitres, condamnation, mais bien seulement taxation ou liquidation de certains dépens qui n'étaient autres que leurs propres honoraires et ceux du Notaire. L'on

a vu que, sous l'Ordonnance de 1667, les arbitres étaient dans l'usage de taxer les dépens : et l'auteur de l'article déjà cité du Nouveau Denisart, nous dit que " si cette jurisprudence était opposée à la lettre de la loi, elle n'était pas au moins contraire à son esprit." La disposition du statut de 1850, relative à la taxation des dépens porte que " ces dépens, en l'absence d'accord sur leur montant, pourront être taxés par un juge de la Cour Supérieure." Cette disposition n'a pas abrogé la faculté que les arbitres avaient, par l'usage, de liquider les dépens. Elle n'a fait que donner aux parties au cas de liquidation par les arbitres, le droit d'appeler de cette liquidation pour la faire reviser par un juge de la Cour Supérieure ; révision que la Compagnie s'est abstenue de demander, quoiqu'elle eût pu le faire même dans le cours du procès devant les premiers juges, donnant pour ainsi dire, par cette abstention, son acquiescement à la liquidation arrêtée par les arbitres. Dans les circonstances, il n'y a aucune plausibilité dans la proposition des Intimés que la sentence arbitrale est frappée de nullité en conséquence de cette liquidation de dépens faite par les arbitres. Cette liquidation tout au plus, si les arbitres n'avaient pas le pouvoir de la faire, ne pourrait être regardée que comme une demande ou une notification du montant des honoraires auxquels ils croyaient avoir droit, sauf aux parties à contester et à faire réviser suivant la loi.

Le jugement rendu à l'unanimité est dans les termes suivants :

La Cour, etc. Considérant qu'en vertu de la loi du pays, et plus particulièrement en vertu des actes de la Législature Provinciale qui régissent la Compagnie des Intimés, le Notaire Jobson avait, en sa dite qualité de Notaire, pouvoir de recevoir la sentence arbitrale dont il s'agit en cette cause et d'en garder la minute ; que le certificat dûment donné par le dit Jobson, (en sa qualité de commissaire préposé à la

réception des affidavits dont il est permis de faire usage dans la Cour Supérieure), de la prestation de serment des arbitres, pouvait être légalement annexé à la minute de la dite sentence, pour ne faire l'un et l'autre, en la manière ordinaire en pareil cas, qu'un seul tout, un seul et même acte, dont le dit Jobson aurait qualité pour délivrer des expéditions ; que l'expédition, ou copie notariée, délivrée par le dit Jobson de la dite sentence arbitrale, et de la dite prestation de serment, et produite en cette cause, fait preuve légale de l'une et de l'autre, que, par conséquent, en jugeant le contraire par le jugement dont est appel, la Cour de première instance a mal jugé : infirme le dit jugement, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal, le 13 Avril, 1853, et cette Cour, procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, condamne les Intimés à payer à l'Appelant, pour les causes mentionnées en sa demande, d'abord la somme ds £44 2 0 cours actuel, montant de l'indemnité à lui accordée par la dite sentence arbitrale, et ensuite celle de £14 même cours pour les frais ou honoraires de son arbitre et du dit Notaire, et les dépens tant en la Cour de première instance que sur l'appel. (1)

**ROBERTSON, A. et G.**, pour l'Appelant.

**Rose et Monk**, pour les Intimés.

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(1) Voyez la cause de Roy vs. The Champlain and St. Lawrence Railroad Company, en Cour de première instance rapportée au 4<sup>e</sup> Vol. des Décisions B. C., p. 189.

QUEEN'S BENCH. } DISTRICT OF MONTREAL  
 APPEAL SIDE. }

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice,  
 AYLWIN, DUVAL and CARON, Justices.

{ MOFFATT *et al.* ..... *Appellants.*  
 and  
 { BOUTHILLIER, *es qua.* ..... *Respondent.*

Held :—That upon importation of goods from a foreign country into Canada, duty may be charged on such goods, either on their value at the time of the purchase of the same, or upon their value at the time of export, on the contingency of a rise in the interval.

Jugé :—Que sur l'importation de marchandises de pays étrangers en cette Province, les droits imposés sur icelles peuvent être chargés sur la valeur de telles marchandises à l'époque de leur achat, ou sur leur valeur à l'époque de leur exportation, dans le cas d'une augmentation de valeur dans l'intervalle.

Judgment rendered the 4th July, 1855.

Sir L. H. LAFONTAINE, Baronet, Chief-Justice : It is alleged, in the declaration, that at Cognac, in France, on the 18th Dec., 1852, the Plaintiffs purchased the quantity of sixty hogsheads of Brandy, (the growth and manufacture of that country), which remained at Cognac until the 16th April, 1853, when the same were shipped and exported from Charente, in France, (the nearest sea port to the place of purchase), to the port of Montreal ; that the said goods arrived at this port on or about the 17th July, 1853, and were warehoused according to law ; that on or about the 5th Sept. following, on the removal of the goods from the warehouse, the Plaintiffs had to pay, under protest, duty on the value of the goods, (as appraised by the said collector) at the time of their exportation from France, whilst the Plaintiffs pretended only to be liable and offered to pay duty on the "true and fair market value" of the said goods at the time the same were purchased ; That the Plaintiffs were then compelled to pay the Defendant a sum of £50 5s. currency, which was the amount of *ad valorem* duty chargeable on the increase in the price or value of the said goods between the time of purchase

and exportation, which sum the Plaintiffs now claim from the Defendant.

The action was dismissed by the judgment of the Superior Court at Montreal, upon a *defense en droit*; from which judgment the Plaintiffs have appealed.

The question therefore is : whether, on importation of goods from a foreign country into this Province, duty be chargeable on their value at the time of purchase, or at the time of export, on the contingency of a rise in the interval?

The decision of the question depends upon the construction of three of our Provincial Statutes. (1)

1. By the 2nd section of the Act of 1849, the duties of customs are to be raised, levied, collected and paid upon goods, wares and merchandise "imported into this Province, or taken out of warehouse for consumption therein." (2)

2. Every importer, within a very short time after the arrival of his goods, is obliged to make due entry of the same, by delivering to the collector or other proper officer, a bill of the entry thereof in the form prescribed by law, and at the same time to pay down all duties due upon the said goods, unless the same are to be warehoused, (3)

3. Under the 24th section of the same Act, the importer has the right to enter his goods for exportation, or to warehouse the same on giving security, (by his own bond only in the latter case), for the payment of the amount of all duties to which such goods shall be liable ..... "without payment of any duties in either case on the first entry thereof"..... and " provided always, that all such goods shall finally be cleared, either for exportation, or home consumption, within

(1) 10th and 11th Vict., ch. 31, 1847:—12th Vict., ch. 1, 1849:—16th Vict. ch. 85, 1853.

(2) See also Act of 1847, secs. 24, 26.

(3) 10th and 11th Vict., ch. 31, sec. 12.

two years from the date of the first entry and warehousing thereof, (unless such collector or proper officer shall see fit to extend the time.)"

4. There must be in the bill of entry a statement of the value for duty of the goods therein mentioned, such bill to be signed by the person making the entry, and "verified in the form or to the effect of the oath provided for the case in the Schedule B," which schedule is annexed to the Act of 1849; and with the bill of entry there shall be left with the collector, if required by him, an invoice of the goods attested upon oath and verified in the same manner according to said Schedule B. (1) The wording of any such oath may be changed to suit the circumstances of the case, and the oath will be sufficient, provided the requisite facts are distinctly stated and sworn to or affirmed. (See said schedule.)

5. But if a sufficient invoice is not and cannot be produced, the goods may then be entered by a bill of sight, upon certain conditions to be performed by the importer, and particularly on his depositing in the hands of the collector a sum of money sufficient to pay the duties on such goods. (2)

6. How then is the value of goods subject to *ad valorem* duties, to be ascertained? Though the 15th Section of the Act of 1847, and the 6th Section of the Act of 1849, having special reference to that matter, are now respectively repealed, yet, in order to arrive at a proper conclusion, I find it necessary to enter into an examination of their provisions in that respect.

7. By the 15th Section of the Act of 1847 (repealed by the Act of 1849, Section 1), it is enacted that in all cases of duties *ad valorem*, "such value shall be the invoice value of the goods at the place whence the same were imported, with

(1) 12th Vict., ch. 1, sec. 8;—16th Vict., ch. 85, sec. 5.

(2) 10th and 11th Vict., ch. 31, sec. 13;—12th Vict., ch. 1, sec. 3.

the addition of ten pounds per centum thereon," such value for duty calculated as aforesaid to be stated in the Bill of entry ; and the original invoice (if any there be) is to be produced to the Collector, " in order to prove the value of such goods," accompanied with a declaration, by the importer, his Agent or Clerk, that such invoice " is just and true, and that it contains the exact particulars and true prices of the articles subject to *ad valorem* duty & &." There can be no doubt that by the words " Invoice value," as used in that 15th Section, and " true prices" in the above " declaration," is meant the actual price which the importer has paid, or has agreed to pay, for his goods at the time of the purchase, assuming, of course, such invoice to be genuine. Is it to be inferred from all that, that the price or cost of the goods, so stated in the invoice, is to be taken as conclusive proof of the value of the same for duty, with the addition of ten per cent, and as such is binding upon the collector ? Were such to be the legal construction of the 15th section as above cited, it would necessarily lead to the conclusion, as contended for by the Appellants, that the dutiable value of goods is their value at the time of purchase, or, in other words, the purchase price itself, and no other.

I do not think this a correct construction. True it is, in another part of the 15th section, it is stated that the " cost so declared," shall, with the addition of ten per centum as aforesaid, be the value for duty," but with the following exception or condition : " if not disputed by him " (the collector). Since then the " cost so declared " to be the value for duty, may be disputed by the collector, even when the invoice produced is genuine, for the Act makes no distinction in that respect, it follows that the invoice value is not conclusive or binding upon the collector. Such invoice, although required to be produced " in order to prove the value," is merely intended as one of the means by which the real and true value for duty may be ascertained. Indeed the

15th section of the Act of 1847, is immediately followed (see 16th section) with an enactment giving the collector or proper officer of Customs the power to require from the importer "such further proof as he may deem necessary, by oath or declaration, production of invoice or invoices, or bills of lading or otherwise, that such goods are properly described and rated for duty." There was no need to give such a power to the collector, if the value for duty were to be the value stated in the particular invoice produced with the bill of entry. This power to require further proof, is now much more extensive under the Act of 1849, since, by section 14th, any appraiser, or any collector acting as such, may "call before him and examine upon oath any owner, importer, consignee or other person, touching any matter or thing which such appraiser or collector may deem material in ascertaining the true value of any goods imported, and to require the production on oath of any letters, accounts, invoices or other papers in his possession relating to the same."

8. Reverting to the 15th section of the Act of 1847, I find that, "if it shall appear to the collector or other proper officer, "that such articles have been invoiced below the real and "true value thereof," (not, be it observed, invoiced below the real and true price paid for them, thus excluding all idea of fraud) "at the place whence the same were imported, or "if there be no invoice, the articles may in such case be "examined by two competent persons, appointed from time "to time by the Governor." It may be objected that no mention is made here of the time of export ; it is true, but no more on the other hand, is any mention made of the time of purchase, and though the time of export is not mentioned in terms, yet, it seems to me that it is to be inferred from what follows in the 18th section, that such period was the period in contemplation. The examiners or appraisers are to declare on oath "what is the true and real value of such articles at the place whence the same were imported " (not

purchased, be it observed) " and the value so declared on the oath of such person, with the addition of ten per centum thereon, shall be deemed to be the true and real value of such articles for duty, and according to which the duties imposed thereon shall be charged and paid."

1. The word " imported " is used, and not the word " purchased ; " the fact of importation is necessarily subsequent to the fact of purchase ; and as the former cannot be anterior to the fact of exportation from the place of purchase, it seems to imply the time of exportation from the place of purchase for importation into Canada, as being the period intended at which to fix the value for duty.

2. The 15th section makes no distinction between the case where there is no invoice, and the case of the goods being invoiced below the real value. It applies as well to the one as to the other. When there is no invoice, no mention of date of purchase, it seems to follow, as a natural or reasonable consequence that, in such a case, the time which the 15th section has in contemplation for fixing the value for duty, must be the time of export, as being the only one at which such value can be established so as to satisfy the requirements of the law, if otherwise, we must go back to some other indefinite period, and then to what period ? Why not as well to 10 years previous to the exportation as to one or two years ? Then, if in the case of there being no invoice, the time of export is the time to be guided by, it cannot be otherwise in the other case, since the Act has made no distinction.

9. For the foregoing reasons, I am of opinion that, under the Act of 1847, the dutiable value of goods was their value at the time of export, that the invoice, although, no doubt, generally acted upon, was not conclusive, and could not prevent an appraisement from being made, whenever deemed necessary for the protection of the revenue. I may here

remark that it is even admitted, in his Factum, by the learned Counsel of the Appellants, that the Act of 1847 "by no means adopted the invoice as final, since the 15th and 16th Sections gave to the collector, or other officers, exactly the same powers as are given to the Appraisers by the 6th Section of the 12th Vict. (1849) for ascertaining the value, irrespective of the invoice."

10. The Act of the 12th Vict. ch : 1, Section 1st, repeals *in toto* the 15th Section of the Act of 1847, and, by Section 6th, enacts that, "in all cases of *ad valorem* duties upon goods, " such value shall be understood to be the actual cash value "in the principal markets in the country where the same " were purchased, and whence they were exported to this " Province ; or, if such goods were purchased in one Country " and exported to this Province from another Country, then "in the principal markets of the Country where such goods " were purchased by the person or persons importing the " same into this Province ; and it shall be the duty of each " and every appraiser," (to be appointed by the Governor under the authority of the same Act, Sect. 5th) " and of " every collector when acting as such, by all reasonable " ways and means in his power, to ascertain, estimate and " appraise the true and actual market value and wholesale " price as aforesaid, of any goods to be appraised by him, " any invoice or affidavit to the contrary notwithstanding, in " order to estimate and ascertain the value upon which duty " is to be charged as aforesaid."

11. If under the 15th section of the Act of 1847, there could have existed some doubt as to the invoice not being conclusive or final, there can be none under this Act of 1849, the language of the 6th section being too positive in that respect. But what the Appellants contended for is that, under this Act of 1849, as under the former Act, the main question remains the same, and that therefore the dutiable

value of goods is their value at the time of purchase, and not at the time of export.

If the reasons already assigned in support of my opinion that, even under the Act of 1847, the time of export was to regulate the matter, are good, *a fortiori* do they apply the same way under the provisions of the 6th section of the new Act. It is true that the word "purchased," is used in that section, but it does not follow that by it is to be meant the time of purchase, as applicable to the question under consideration, to the exclusion of the time of export, though the word "exported" is also used in the same sentence. The word "purchased," which is not to be found in the corresponding 15th section of the Act of 1847, is introduced in the 6th section of the Act of 1849, in connection with a subsequent provision in the same, and merely to explain it, which provision, relating to goods purchased in one country and exported to Canada from another country, was not in the Act of 1847. The omission of the word "purchased" in the 6th section of the Act of 1849, might have left some doubts as to whether, in such a case, the value for duty, should have been the value of the goods in the one country or in the other. It is evidently to remove any such doubts that the word "purchased" was inserted. It being so, the word "exported" in the same sentence, is not controled in any way by this word "purchased," and being so used in the same sense as the word "imported" in the 15th section of the Act of 1847, the reasoning applied to the one must also apply to the other, and the more so as the word "actual" employed in the 6th section, in relation to the dutiable value of goods, is calculated to give it an additional force.

12. Let us examine the several forms of oath prescribed by that very Act of 1849. If, in the present instance, the entry of the 60 hogsheads of brandy purchased by the Appellants was made by their agent or clerk, the latter (see 1st form of

oath of Schedule B), must have stated upon oath, among other things, that "the invoice exhibits the actual cost, or fair market cash value, at the time when the same were thence exported to this Province, in the principal markets in France, of the said goods, wares and merchandise."

This, in my opinion, is sufficient to decide the question. In fact, such positive language leaves no room for any doubt at all. However, it has been contended that no such weight should be attached to the words quoted from the above form of oath, since they are not to be found in the form of oath prescribed for the owner of goods, and that if the entry were made by one of the Appellants, he would only have to state on oath (2nd form of Schedule B.) "That the invoice contains a just and faithful account of the actual cost of the said goods, wares and merchandise," not being obliged, by that printed form, to state any thing more, as far as regards the point at issue. One form of oath being, as printed, different from the other, it is contended, it seems that one must give way to the other. But which of the two? shall it be that form which is complete and meets all the facts, and is not in any way contrary to the enactments to which it refers, or shall it be the other which, as printed, is incomplete, does not meet all the facts of the case, and makes no allusion to certain essential requirements of the law? For instance, the 6th section requires the value for duty to be the value in the particular markets in France. No such statement is to be found in the owner's oath, if made strictly according to the printed form. This shows that the form is defective in one essential point; for although the "actual cost" as sworn to by the Appellants according to that form, may be a correct statement, yet it may not be the value "in the principal markets." This is a case where there is a necessity, in order to make the oath complete, to change the wording of the form. The defect of the form would consist in the omission of the words above quoted of the clerk's oath; which words meeting all the facts,

and not being contrary to any of the enactments of the Custom's Acts, the clerk would have no right to change or to omit, they must form part of the statement made by him upon oath, when entering his master's goods for duty, and have their full effect. But if the said words are neither to be inserted in the oath taken by the owner himself, or to be understood as forming part of the same, it would lead, in case of a rise in value between the purchase and the time of exportation, to this absurd consequence, that of two owners of goods by them respectively purchased in the same place, at the same time, for the same price, and imported into Canada in the same vessel, one, being on the spot, making the entry himself, would have to pay only on the "actual cost" of his goods, whilst the other, being, on account of illness or absence, obliged to have his entry made by his clerk or an agent, would have to pay duty on the higher value at the time of export.

13. If reference be made to the form of oath required to be taken by the owner, when the goods have not been actually purchased, (see 3rd form of the Schedule), it will be seen that he is obliged to swear that the invoice contains "a. just and faithful valuation of the same, at their fair market cash value in the principal markets in France, at the time when they were so exported;" this being the same statement, in substance, as that required of an agent or clerk.

14. There is another form of oath required of an owner residing out of this Province, or when the owner is the manufacturer. The form seems to be composed of two parts, one containing the oath intended for the owner of goods either as a manufacturer or otherwise, but not by purchase, and the other containing the oath intended for a non-resident owner by purchase. The first oath, as far as the present question is concerned, is of the same import and effect as the 3rd form of oath in Schedule B, that is to say, valuation at

the time of export. The form of the other oath does not go so far, it is true, as to mention in express terms, value at the time of export, but it goes farther than the before mentioned printed form of oath required of the resident owner by purchase, a fact which cannot but confirm the opinion I have already expressed that the latter form of oath is not complete. According to the form of oath under consideration, required of the non-resident owner, the statement would be that the invoice contains "a just and faithful account of the actual cost of the said goods, wares and merchandize, and of their fair market value in the principal markets (words omitted in the above 3rd form of oath) in France, at the time when the same were purchased for my account." At first, there appears to be a difference between this oath and the others. But it may be easily accounted for. The non-resident owner takes the oath in the country where he lives. He may do so at a time when he only intends to ship the goods (see the first part of the form of oath, which, in this respect, is different from all the others); he is then required to state that the invoice is "the true and only invoice of the goods, wares and merchandize therein mentioned, intended to be shipped by me in the Ottawa, whereof A. B. is master, and consigned to C. D. at Montreal, in the Province of Canada." His goods may be shipped or exported long after he has taken the oath, and sent the same to his consignee in Canada. Such an oath could not therefore make any mention of the value of the goods at the time of export. But does it follow that the latter value shall not be the value for duty? I think not, and this is evident from the oath which, in that case, the Montreal consignee will have to take on entering the goods for duty. He is required to take the same oath as the clerk already alluded to, and therefore to state the value at the time of exportation, which shows that he must either know that value himself or be kept informed in that respect by the consignor, the non-resident owner, who, notwithstanding the oath already

taken by him, is still obliged to make known in some way or other, with regard to the Canadian Customs duties, the value of his goods at the time of export.

15. That the Legislature had in contemplation that the value for duty should be the value of goods at the time of export, appears to me to be the natural and logical conclusion to be drawn from the 9th Section of the Act of 1849, which enacts "that in any such Bill of Entry, it shall "be lawful for the person making the same, to add such sum "to the value stated in the Invoice, as shall be sufficient to "make the value for duty such as it ought to be under the "provisions of this Act, and such value shall then, for the "purposes of this Act, stand in stead of the value as it would "appear by the invoice ; and no evidence of the value of "any goods imported into this Province, or taken out of "warehouse for consumption therein, at the place whence, "and the time when, under this Act they are to be deemed "to have been exported to this Province" (not purchased, be it observed,) "contradictory to or at variance with the value "stated in the invoice produced to the Collector, with the "additions (if any) made to such value by the Bill of Entry, "shall be received in any Court in this Province, on the part "of any party except the Crown.

16. What reason will induce the importer, in his Bill of Entry, to add to the value stated in the invoice, when such invoice is genuine ? He will do so in order to avoid, as much as possible, the risk of incurring a penalty to which he may be liable under the 15th Section of the Act of 1849, by which it is enacted "that where the actual value for duty "of any goods appraised, estimated and ascertained as "aforesaid, shall exceed by twenty per centum, or more, the "value for duty as it would appear by the invoice and Bill "of Entry thereof, then, in addition to the duty otherwise "payable on such goods when properly valued, there

" shall be levied and collected upon the same a further duty equal to one half the duty so otherwise payable." Such appraisement may take place in any case, whether the invoice is genuine or not, and whether or not, under the 9th section, additions to the value are made by the importer. Almost in all cases, it may be assumed that the price paid by the importer is the actual value of the goods at the time of purchase, or at all events cannot be less than such value, by twenty per cent., in that case, there would be no risk of incurring the penalty already mentioned, and therefore no necessity for the enactment of the 9th section, if the dutiable value of goods were to be their value at the time of purchase. It may be objected that the 9th section was intended only to apply to cases of fraud, when goods may be invoiced under the real cost or price of purchase. The answer to that objection is that the Act having made no distinction at all, the 9th and 15th sections not alluding in the least to fraud, the latter must be taken as applicable to genuine as well as to fraudulent invoices. It being so, when, in the case of addition being made to the value stated in the invoice, the law says "that such value shall then, for the purposes of this Act, stand, instead of the value as it would appear by the invoice," it excludes all idea, even in the case of a genuine invoice, of the value at the time of purchase having been adopted as the standard of value for duty. It must then be the value at a subsequent period. And at what period, if it is not that of export, mentioned even in that very 9th section, by the words : "at the place whence and at the time when, under this Act, they are to be deemed to have been exported to this Province." Is there any possibility to construe these words as meaning the time of purchase ?

17. The 6th section of the Act of 1849, is repealed by the Act of 1853, ch. 85, section 3 : but the other parts of that Act, as well as of the schedule, which bear upon the present

question, remain in force. For the enactment so repealed, the new Act, s. 3, has substituted the following : In all cases of *ad valorem* duties, " such value shall be understood to be " the fair market value thereof in the principal markets of the " country whence the same were exported directly to this " Province : and it shall be the duty of each and every ap- " praiser, and of every collector when acting as such, by all " reasonable ways and means in his power, to ascertain the " fair market value as aforesaid, of any goods to be appraised " by him, and to estimate and appraise the value for duty " of such goods at the fair market value, as aforesaid. Pro- " vided always, that by any Departmental Order authorized " by the Governor, it may be provided that in the cases and " on the conditions to be mentioned in such order, and while " the same shall be in force, goods *bond fide* exported to this " Province from any country, but passing *in transitu* through " another country, shall be valued for duty as if they were " imported directly from such first mentioned country."

This provision of the new Act does not at all alter the nature of the question under consideration. If, before the passing of that Act, the value for duty of goods imported into Canada, was to be the value at the time of export, it must continue to be so since the law of 1858.

18. It was objected that, under that system, the foreign manufacturer, for instance, the very one from whom the Appellants have purchased their goods, if he were to import the same goods in Canada, would be in a more advantageous position than the Appellant. I do not think the objection a good one. If the time of export be the rule, then all importers, whether manufacturers or purchasers, are on an equal footing as far as the Canadian market, where they intend to offer their goods for sale, is concerned. They pay the same duties if the goods be the same and exported to this Country at the same time. Besides, under such a sys-

tem, the appraisers have better and more efficient means correctly to ascertain the value of goods, by being enabled to compare at once the several different invoices produced by different importers.

19. An American case was cited by the Appellants, (1) where the rule adopted seems to have been the time of purchase or procurement. From certain extracts given of the American Statutes, and certain statements made at the argument of the case, it is evident that the wording of our statutory law relating to the question is, in some respects, different from that of our Neighbours, therefore the case in Howard cannot help the Appellants. The principal reason assigned by M. Justice Woodbury, for adopting the time of purchase, or procurement as the time for fixing the value for duty, was "because the idea of having the value and charges fixed, and assessing the duty on them, is to tax the importer on the amount or value he has expended. And what he has expended cannot be more than what he has thus paid." I do not think that this rule, the effect of which, it seems, would be that duties attach to the owner of goods rather than to the goods themselves, can obtain under our provincial statutes, with us it must be quite the reverse.

Even under the Act of 1847, it was necessary to add in the Bill of Entry ten per cent to the invoice value. This is not all, in case of appraisement, the value might be further increased, as it may be under the Acts of 1849 and 1853. The duty, therefore, was not confined to what the importer had paid, or expended.

*A fortiori* must such a rule prevail under the Acts of 1849 and 1853, for the several reasons already stated above.

What may show beyond doubt that duty attaches to goods, and must be charged upon their value, irrespective of what

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(1) 10 *Howard's Rep.*, *Groely v. Thompson et al.*

the importer has paid or expended, is that, by sections 16 and 17 of the Act of 1849, the collector may take the duty in kind, or take goods on paying the value assigned in the Bill of Entry and charges, and that by section 24th of the Act of 1847, the importer may abandon any whole package for duties, without being liable to pay any duty on the same.

20 Upon the whole, the conclusion to be arrived at, in my opinion, is that the Canadian Customs duties are based upon the principle of taxing the importer, not on the amount or value he has expended, but on the amount of the value of his goods, and that such value for duty is the value at the time of export ; which conclusion, I believe, is in accordance with the enactment (see 79th s. of Act of 1847) that " all the terms and provisions," of our said Customs Acts " shall receive such fair and liberal construction and interpretation " as will best insure the protection of the revenue, and the " attainment of the purpose for which such acts shall have " been passed according to their true intent, meaning and " spirit ;" the three Canadian Acts having to be construed as forming but one and the same Act. (1)

The Court &c. Considering that in the rendering of the Judgment appealed from, to wit, the Judgment rendered by the Superior Court at Montreal, on the thirty-first day of March, 1854, there is no error, doth confirm the same with costs.

**Rose and Monk, for Appellants.**

**C. J. DUNLOR, for Respondent.**

(1) 12 Vict., ch. 1, sec 29 :—16 Vict., ch. 84, sec. 8.

**SUPERIOR COURT.—QUEBEC.**

**Before BOWEN, Chief-Justice, and BADGLEY, Justice.**

Held :—That an affidavit for *saisie-arrêt simple* in which it is alleged, "that 'Deponent is credib'y informed, and 'doth verily believe, that the said Defendant is immediately about to secrete 'his estate, debts and effects with an 'intent to defraud, &c.'" is insufficient, and not in conformity with the requirements of the Statutes, 27th Geo. III., ch. 4, sec. 10, and 9 Geo. IV., Cap. 20.

Jugé :—Qu'un affidavit pour saisie-arrêt simple où il est allégué : " que 'le Déposant est croyablement informé, 'et croit vraiment que le dit Défendeur, 'est sur le point de cacher ses biens, 'dettes et effets et ce dans la vue de 'frauder, &c.", n'est pas suffisant, ni en conformité avec les Statuts, 27 Geo. III., ch. 4, sec. 10, et 9 Geo. IV, chap. 20.

Jugé :—Qu'un affidavit pour saisie-arrêt simple où il est allégué : " que le Déposant est croyablement informé, et croit vraiment que le dit Défendeur, est sur le point de cacher ses biens, dettes et effets et ce dans la vue de frauder, &c., " n'est pas suffisant, ni en conformité avec les Statuts, 27 Geo. III, ch. 4, sec. 19, et 2 Geo. IV, V, sec. 1.

Judgment rendered 9th April, 1855.

This case was commenced by a *saisie-arrest simple*, upon the return the Defendant moved to quash the Writ, and the attachment made under the same, upon the ground that in the affidavit upon which the Writ issued, there was not due proof that the Defendant was about to secrete his estate, debts and effects.

The affidavit was thus :—

" Patrick Maguire, of the City of Quebec, in the District of Quebec, Road-Contractor, being duly sworn, saith : that John Harvey, of the said City of Quebec, Contractor, is personally indebted to this Deponent in a sum exceeding ten pounds currency, to wit : in the sum of two hundred and five pounds, currency, for work and labor by this Deponent done and performed for the said John Harvey, at his request, from the twentieth day of June last to the first of January last, within this Province. That this Deponent is credibly informed, and doth verily believe, that the said John Harvey is immediately about to secrete his estate, debts and effects with an intent to defraud this Deponent and his creditors, whereby this Deponent without the benefit of a Writ of *saisie-*

*arrest simple*, to seize and attach the estate and effects of the said John Harvey, may lose his debt or sustain damage.

The motion to quash set forth—

“ That the Writ of *saisie-arrest simple* in this cause issued, and the attachment made under the same, in the hands of the said Defendant in this cause be quashed, and declared null and void, with costs to the said Defendant, in as much as the said attachment was made under and by virtue of process of attachment, to wit : the said Writ of *saisie-arrest*, not in the case of the *dernier équipeur*, issued for attaching the estate, debts and effects of the said Defendant in his hands, prior to trial and judgment, without there being due proof on oath, that the said Defendant was about to secrete his estate, debts and effects, or to abscond, or suddenly intended to depart from the Province, with intent to defraud his creditors or creditor, contrary to law, and to the provisions of the Ordinance of the 27th Geo. III, cap. 4, sec. 10, in such case provided.”

*Per Curiam.* We do not consider the affidavit in this case sufficient. The terms of the affidavit are not in accordance with the requirements of either the Statutes 27th Geo. III, cap. 4, sec. 10, or 9 Geo. IV, cap. 27. (1)

Judgment—

The Court having seen and examined the proceedings had and of record, and having heard the parties by their Counsel, on the Defendant’s motion to quash the *arrêt-simple* in this cause issued, and having maturely deliberated thereon. The Court considering that the affidavit made and filed, whereon the said *arrêt-simple* issued in this cause, does not contain the averments required by law for the legal issue of the said Writ, doth therefore grant the Defendant’s motion, and doth quash

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(1) 4 L. C. Repts., p. 49, *Shaw vs. McConnel* :—Ante p. 195, *Laing et al. vs. Bresler* :—Ante p. 198, *Leverson et al. vs. Cunningham* :—Ante p. 214, *Wurtel et al. vs. Price* :—Ante p. 216, *Baile vs. Nelson*.

the *arrêt-simple* issued in this cause, with costs to the Defendant.

**ALLEYN**, for Plaintiff.

**ANDREWS** and **CAMPBELL**, for Defendant.

**SUPERIOR COURT.—QUEBEC.**

Present **BOWEN**, Chief-Judge, **MORIN** and **BADGLEY**, Justices.

No. 1633. { **POWER**, ..... Plaintiff,  
vs.  
**BEZEAU et al.** ..... Defendants.

The Defendants presented petitions to the House of Assembly against the Election and Return of one of its Members, which were referred to the usual select committee. The Defendants subsequently applied for a commission to examine witnesses, &c., and the committee, under the statute, appointed the Plaintiff (who is a Circuit Judge for Lower Canada,) Commissioner. The Plaintiff performed the duties incumbent on him to fulfil. Before the committee had made their final report, the House was dissolved by proclamation of the Governor General, and the committee thereby for ever precluded from making a final Report. The statute enacts that the Commissioner shall, immediately after the select committee shall have made their final report to the House on the merits of the petition, be entitled to demand and receive, from the parties upon whose application to the select committee such Commissioner shall have been appointed, fifty shillings for every day on which such Commissioner shall have been engaged on such commission, and his travelling expenses.

Held:—In a suit by the Plaintiff to recover from the Defendants the sums allowed by statute, that the Plaintiff had no right of action, either under the statute or at common law.

Les Défendeurs présentèrent des requêtes à la Chambre d'Assemblée contre l'Election de l'un de ses Membres, lesquelles furent réservées au comité spécial en pareils cas. Les Défendeurs subséquemment demandèrent une commission pour l'examen de témoins, etc., et le comité, en vertu du statut, nomma le Demandeur (qui est Juge de Circuit pour le Bas Canada) Commissaire. Le Demandeur remplit les devoirs que lui imposait cette charge. Avant que le comité eut fait son rapport final, la Chambre fut dissoute par proclamation du Gouverneur Général, et le comité par cela empêché de ne jamais faire aucun rapport final. Il est pourvu par le statut, que le Commissaire, immédiatement après que le comité spécial aura fait son rapport final à la Chambre sur les mérites de la requête, aura droit de demander et recevoir, des parties à la demande desquelles le comité spécial aura nommé tel Commissaire, cinquante chelins pour chaque jour qu'il aura été employé dans l'exécution de sa charge, et ses frais de voyage.

Jugé:—Dans une action par le Demandeur contre les Défendeurs, pour recouvrer le montant accordé par le statut, que le Demandeur n'avait aucun droit d'action, soit en vertu du statut soit en vertu du droit commun.

Judgment rendered the 9th day of April, 1855.

The Plaintiff's declaration ran thus:

That heretofore, to wit, at the City of Quebec aforesaid, on the nineteenth day of August, one thousand eight hundred

and fifty-two, a session of the Parliament of this Province was begun, commenced and thence continued to be holden until the fourteenth day of June, one thousand eight hundred and fifty-three ; that whilst the said Parliament was in session as aforesaid, and within the first fourteen days of the said session so commenced and held as aforesaid, being limited with respect to the presentation of Petitions to the Commons House of Legislative Assembly of this Province, by the provisions of the Statute in that behalf made and provided, to wit, by "The Election Petitions Act of 1851," to wit, on or about the twenty-eighth day of August, one thousand eight hundred and fifty-two, at the City of Quebec aforesaid, the said André Bezeau, Richard Charles Porter, and William Brogan, three of the Defendants in this cause, presented to the said Commons House of Legislative Assembly, an Election Petition subscribed by them, complaining of the undue election and return of John Greaves Clapham, to serve in the Parliament aforesaid, as member for the said County of Megantic, and praying, for the reasons therein set forth, that the said Commons House of Legislative Assembly would find and declare that the said John Greaves Clapham was not duly qualified, and did not at any time during and before the closing of the Election, in the said Petition referred to, qualify himself as a candidate at the said Election, and that the said John Greaves Clapham ought not to have been elected or returned as a member to serve in Parliament for the said County of Megantic, in the said Petition mentioned, and that Dunbar Ross, Esquire, in the said Petition named, was duly elected and ought to have been returned as such member for the said county, and that thereupon the said House would direct the return for the said County to be amended accordingly, by erasing therefrom the name of the said John Greaves Clapham, and by inserting in the stead thereof the name of the said Dunbar Ross, or declare the said election for the said

County wholly null and void, and direct that a new Writ should issue for the election of a member to serve in Parliament for the same.

That at the said City of Quebec, on or about the twenty-seventh day of August, one thousand eight hundred and fifty-two, the said Dunbar Ross, the other Defendant in this cause, also presented to the said Commons House of Legislative Assembly an Election Petition, subscribed by him the said Dunbar Ross, complaining of the undue election of the said John Greaves Clapham, to serve in the Parliament aforesaid, as member for the said County of Megantic ; and praying for the reasons therein set forth that the said Commons House would declare the said election and return of the said John Greaves Clapham, wholly null and void, and thereupon, that the said Commons House would direct the return for the said County of Megantic to be amended accordingly, by erasing therefrom the name of the said John Greaves Clapham, and inserting, instead thereof, the name of him the said Dunbar Ross, or that the said Commons House would declare the said election for the said County wholly null and void, and direct that a new Writ should issue for the election of a member to serve in Parliament for the same.

That afterwards, and while the said Parliament was in session as aforesaid, under and according to the provisions of the said Election Petitions Act of 1851, a select committee of the said Commons House was legally appointed and sworn to try the matter and merits of the said two petitions so presented to the said Commons House by the said Defendants, and try and determine the merits of the return of the said election complained of by the said Defendants, and afterwards, and while the said session continued, the said two petitions of the said Defendants were referred to the said select Committee by the said House, in conformity with the provisions

of the said Act, in order that the matter thereof might be tried by the said select committee.

That afterwards, in pursuance of the provisions of the said Act, the said select Committee met at the time and place appointed for that purpose, to wit, at the City of Quebec, on or about the ninth day of June, one thousand eight hundred and fifty-three, and proceeded to try the merits of the said two election Petitions of the said Defendants so referred to them.

That afterwards, to wit, at the said City, on or about the last mentioned day, the said Defendants made application to the said select Committee for an order for the nomination and appointment of a Commissioner to enquire into the allegations of them the said Defendants in their said petitions set forth, as to the insufficiency in value of property on which the sitting Member, to wit, the said John Greaves Clapham, qualified, and also as to qualification of voters for the said sitting Member, as provided by the said Act, and thereupon on the said ninth day of June, one thousand eight hundred and fifty three, the said select Committee granted the said application of the said Defendants, and at the instance and request of the said Defendants, made an order for the nomination and appointment of the said Commissioner

That afterwards, to wit, on the eleventh day of the said month of June in the year last aforesaid, in furtherance of their said order, Adam Johnston Ferguson, Member of the said Commons House of Legislative Assembly of this Province, and chairman of the said select Committee, addressed his Warrant under his hand and seal, bearing date at the said City of Quebec, on the last mentioned day, to the Plaintiff in this cause, and thereby informed and notified the said Plaintiff, that whereas, upon the application of the said Defendants to the said select Committee, it had been ordered by the said Committee, in pursuance of the powers vested in them by the said Election Petitions Act of 1851, that a Com-

mission should issue for the examination of witnesses on the trial of the said Election Petitions, and that the said Plaintiff should be appointed such Commissioner ; that the said presents were therefore, in compliance with the said orders, and in pursuance of the provisions of the said Act to nominate, constitute and appoint the said Plaintiff to be such Commissioner, and thereby the said Plaintiff was nominated, constituted and appointed Commissioner to examine and inquire into all matters and things to him the said Plaintiff for that purpose referred, or to be referred by the said Election Committee, or any other Election Committee that might be appointed in their place for the trial of the said Election petitions, according to the provisions of the said Act, with all such powers and authority as by law belonged to the office of such Commissioner, by virtue of the said Act or otherwise however ; and the said Plaintiff was by the said Warrant expressly commanded with all necessary speed to repair to the said County of Megantic, and there, at such place therein as the said Plaintiff should for that purpose appoint, on Tuesday, the twenty-eighth day of June then instant, proceed with the examination and inquiry aforesaid, and all and whatsoever he, the said Plaintiff, should do, or cause to be done in the premises, to return to the Honorable the Speaker of the said Commons House of Legislative Assembly, for the time being, in the manner and within the time, by the said Act, for that purpose prescribed, and this the said Plaintiff was in no wise to omit under a penalty of one hundred pounds, and such other penalties as he might by law incur, by reason of any such omission or neglect.

That afterwards, to wit, on or about the said eleventh day of June, in the year last aforesaid, in pursuance of the provisions of the said Act, the said chairman of the said select committee addressed to the said Plaintiff true copies of the said two petitions of the said Defendants which had been referred to the said committee, as aforesaid, and of the lists

and disputed votes, and statements of the several parties which had been delivered according to the provisions of the said Act, together with a true copy of the order made by the said committee as aforesaid.

And the said Plaintiff doth further represent—

That afterwards, on the said twenty-eighth day of June, in the year last aforesaid, being the day appointed in and by the said warrant appointing the said Plaintiff to be Commissioner as aforesaid, at the Court House, in the Township of Leeds, in the County of Megantic, in the District of Quebec, being the place appointed by the said Plaintiff for that purpose, at the hour of ten of the clock in the forenoon, the said Plaintiff, as such Commissioner, opened his Court and commenced his proceedings as such Commissioner, and read the said warrant of the said chairman of the said select Committee, and also the copies of the said two petitions and of the said other papers transmitted to the said chairman, and the said Plaintiff, before further proceeding in the business of his said commission, took and subscribed on the day last aforesaid, the oath set forth in the schedule to the said Act annexed, marked B (3,) in the presence of the said John Greaves Clapham, the said then sitting member, one of the parties interested and concerned in the said election petitions, and of John Hume, the agent of the said Defendants, the other parties interested and concerned therein, and the taking of the same was then and there noted in the minutes of said commission.

And the Plaintiff doth further represent—

That afterwards, at the Township last aforesaid, on the day last aforesaid, in obedience to the terms of the said warrant, and to the enactments of the said Election Petitions

Act, the said Plaintiff proceeded with the examination and inquiry aforesaid, and examined all the witnesses who came before him, and examined all matters referred to him, and scrutinized the rights of the several votes objected to, and performed and discharged all and singular the duties incumbent on him to perform and discharge, as such Commissioner, and so continued in the discharge and performance of the said several duties from the day last aforesaid, as well at the last mentioned Township, as in the Townships of Halifax and Inverness, in the said County, (in which said last mentioned Townships the said Court of the said Plaintiff was held on the days for that purpose appointed by the said Plaintiff) for a long period of time, to wit, down to the thirtieth day of November, in the year last aforesaid. That the said Plaintiff was necessarily engaged as such Commissioner on the said commission in and about the examination and inquiry aforesaid, and in about the execution and discharge of the duties hereinabove mentioned for and during sixty-nine days, from the twenty-third day of June to the thirtieth day of November, in the year last aforesaid, at the periods mentioned in the bill of particulars herewith filed, and that the said Plaintiff travelled two hundred and fifty miles from and to his usual place of abode, to wit, the said City of Quebec, in his attendance on the execution of the said commission, as the whole is detailed in the said bill of particulars.

That after the evidence before the said Plaintiff had been closed and within the time by the said Act for that purpose prescribed, the said Plaintiff caused a copy of the minutes of all his said proceedings to be made, and examined the same with the said minutes, and signed and sealed the said copy, and transmitted the same by his Clerk, through the Post Office, to the speaker of the said Commons House of Legis-

lative Assembly of this Province, in conformity with the provisions of the said Act, and in obedience to the terms of the said Warrant.

That by reason of the premises and by law, the said Plaintiff is entitled to demand and receive from the said Defendants (jointly and severally), being the parties interested and concerned in the said two Election Petitions upon whose application to the said Select Committee the said Plaintiff was appointed Commissioner as aforesaid, fifty shillings of lawful current money for each and every of the said sixty-nine days on which the said Plaintiff was necessarily engaged, as aforesaid, as such Commissioner, on the said commission, amounting together to the sum of one hundred and seventy-two pounds ten shillings of said money, and also his, (to wit, the Plaintiff's) travelling expenses, at the rate of one shilling of said money, for each and every of the said two hundred and fifty miles, which the said Plaintiff travelled as aforesaid, from and to his said usual place of abode, in his attendance on the execution of the said Commission, amounting to the further sum of twelve pounds ten shillings of said money, together with the further sum of two shillings and one penny of said money, for postage paid by the said Plaintiff, on the reception and transmission of a portion of his said proceedings and instructions.

That the said last mentioned several sums together amount to the sum of one hundred and eighty-five pounds, two shillings and one penny of said money, in which last mentioned sum the said Defendants are by reason of the premises and by law, jointly and severally indebted to the said Plaintiff.

The declaration in addition contained a special count for work and labor done and performed in and about the special duty imposed upon the Plaintiff, as such Commissioner, and also contained, in addition, the ordinary *assumpsit* counts for

work and labor done and performed, and money paid; laid out and expended, &c. ; and concluded by praying that the Defendants be condemned, jointly and severally, for the amount demanded, with interest and costs.

The Defendant pleaded the *Défense au fonds en fait* ; and by perpetual peremptory exception—

That in and by the tenth section of the Election Petitions' Act of 1851, referred to in the said declaration, it is provided and enacted as follows, that is to say :

" That before any Election Petition shall be presented to " the House, a recognizance shall be entered into by one, " two, three or four persons, as sureties for the person sub- " scribing such Petition, for the sum of two hundred pounds " in one sum, or in several sums of not less than fifty pounds " each, for the payment of all costs and expenses which, " under the provisions herein contained, shall become payable " by the person subscribing the Petition, to any witness " summoned in his behalf, or to the sitting member, or other " the party complained of in such Petition, or to any party " who may be admitted to defend such Petition as herein- " after provided, or to a person who on the application of " such Petitioner for the issue of a commission to take evi- " dence on such trial, may be appointed a Commissioner for " that purpose, or to any Clerk, Bailiff or other officer " employed by such Commissioner in or about or in any way " relating to the execution of the commission issued to him " in that behalf, and such recognizance may be in the form " or to the like effect as is set forth in the schedule to this " Act annexed marked A, with such alteration as may be " necessary to adapt such form to the circumstances of the " case."

That in and by the 130th section of the said Act, it is amongst other things further provided as follows, that is say :

" That every Commissioner so to be appointed in manner aforesaid, shall immediately, after the Select Committee on the Petition in question shall have made their final report to the House on the merits of the said Petition, be entitled to demand and receive from the party or parties interested or concerned in such Election Petition, upon whose application to such Select Committee such Commissioner shall have been appointed, fifty shillings for every day which such Commissioner shall have been necessarily engaged on the said Commission, and also his travelling expenses at the rate of one shilling for every mile which such Commissioner shall have travelled, from and to his usual place of abode, in his attendance on the execution of such Commission".

That is and by the 139th Section of the said Act, it is further provided as follows, that is to say :

" That the costs and expenses adjudged by any such Select Committee, as aforesaid, to be paid, or which otherwise may become payable under the provisions of this Act, to any party prosecuting, or opposing, or preparing to oppose, any Election Petition, or to any witness summoned to attend before any Committee, under the provisions of this Act, shall be ascertained in manner following, that is to say ; on application made to the Speaker of the Commons House of Legislative Assembly, by any such Petitioner, party or witness, for ascertaining such costs and expenses, not later than three calendar months after the determination of the merits of such Petition, or after any order of the House for discharging the order of reference of such Petition to the General Committee of Elections, or after the withdrawal of any Petition, as hereinbefore provided, the Speaker shall make an order that the same be taxed, and shall proceed to examine and tax such costs and expenses, and shall report the amount thereof, together with the name

" of the party liable to pay the same, and the name of the  
 " party entitled to receive the same, to the House, and shall  
 " also, upon application made to him, deliver to the party a  
 " certificate signed by him expressing the amount of the  
 " costs and expenses allowed on such report, with the name of  
 " the party liable to pay the same, and such certificate so sign-  
 " ed by the Speaker shall be conclusive evidence for all pur-  
 " poses whatever, as well of the amount of the demand as of  
 " the title of the party therein named to recover the same, from  
 " the party therein stated to be liable to the payment thereof;  
 " and the party claiming under the same shall, upon pay-  
 " ment thereof, give a receipt at the foot of such certificate,  
 " which shall be a sufficient discharge for the same."

That in and by the 135th section of the said Act, it is further provided as follows, that is to say :

" That whenever such Committee reports to the House  
 " that the opposition made to any such Petition by any party  
 " appearing before them was frivolous or vexatious, the per-  
 " sons who signed such Petition shall be entitled to recover  
 " from the party with respect to whom such report is made,  
 " the full costs and expenses which such Petitioners have  
 " incurred in prosecuting their Petition; such costs and  
 " expenses to be ascertained in the manner hereinafter des-  
 " cribed, to wit, in the manner prescribed in and by the  
 " section last above recited.

And the said Defendants not confessing or admitting as aforesaid, do further allege and say :

That it is not alleged nor shewn in the said declaration that all the formalities prescribed in and by the said Statute, and required to entitle the said Plaintiff to institute an action at law to recover from the said Defendants the amount demanded by the present action, or any part thereof, have been observed, and that, in truth and in fact, the said formalit-

ties have not, nor has any one of them, been observed and complied with, pursuant to the requirements of the said statute.

That at the commencement of the Session of Parliament, mentioned in the said declaration, the said Defendants, André Bezeau, Richard Charles Porter and William Brogan, Petitioners, in and by one Petition against the return of John Greaves Clapham, in the said declaration named, as member of the Provincial Parliament for the County of Megantic, and the said Defendant, Dunbar Ross, Petitioner, in and by another Petition against the said return of the said John Greaves Clapham, caused respectively recognizances to be entered into for the payment of all costs and expenses which, under the provisions of the Election Petitions Act of 1851, referred to in the said declaration, should or might become payable by them upon their respective Petitions aforesaid, to any party entitled to receive the same, conformably to the directions of the said Statute.

That in and by the evidence taken under the Commission executed by the said Plaintiff, and in the said declaration mentioned, and returned and reported to the Honorable the Speaker of the said Commons House of Legislative Assembly, before the twenty-third day of June, in the year one thousand eight hundred and fifty-four, it abundantly appears that the said Defendant, Dunbar Ross, the petitioning candidate in the said declaration named, after a scrutiny of all the votes enregistered in favor of John Greaves Clapham, Esquire, the sitting member, and in the several documents accompanying the said Commission referred to, had an absolute majority of one hundred and forty legal votes over the said sitting member, under and by virtue of which evidence and scrutiny the said Dunbar Ross fully established that he ought to have been returned as duly elected a member of the said

**Commons House of Legislative Assembly, to represent the County of Megantic, in the said declaration mentioned, and was entitled to the seat then held by the said sitting member as representative of the said County of Megantic, and the opposition of the said John Greaves Clapham, to the said petition was frivolous and vexatious.**

That the Select Committee appointed by the said Commons House of Legislative Assembly to try the merits of the said Election Petitions, in the said declaration mentioned, did not, on or before the said twenty-third day of June, in the year aforesaid, make their final report to the said Commons House of Legislative Assembly, on the merits of the said Election Petitions, or of either of them, as required in and by the said 130th and other sections of the said Act, nor were the costs and expenses incurred by any one of the said parties upon the said Election Petition, and the opposition thereto, ascertained, or certified in the manner prescribed in and by the said 139th section of the said Act, nor otherwise however, nor were the same adjudged by the said Select Committee to be paid by either of the said parties to the other of them, at any time before the day and year last aforesaid, and without the making of which final report, and an adjudication upon the costs to be paid by either party, and the certifying thereof, and of the person entitled to receive the same, the said Plaintiff hath no right of action whatever against the said Defendants, nor any one of them, under the provisions of the said statute, nor has this Honorable Court, any jurisdiction or power to award the said costs or any part thereof.

That on the said day and year aforesaid, the Parliament of the Province, under and by virtue of a proclamation to that effect, in due form of law made, was dissolved, by reason whereof, the said Select Committee became and was discharged, and the said Commons House of Assembly, and the said Select Committee were thereby for ever prevented

and incapacitated from making such final report, or ascertaining the costs aforesaid, or adjudicating upon the payment thereof, or making any report, or order, or adjudication whatsoever in the premises. Whereby, and by reason of the premises, the said Defendants, and each of them, were prevented and debarred from demanding or recovering from the said sitting member the full costs and expenses by them incurred in prosecuting their said Election Petitions, as provided in and by the said 135th section of the said Act, and the said Plaintiff was and is thereby precluded from any right or action in the premises, against them the said Defendants, or any one of them. And the Defendants concluded by praying for the dismissal of the action.

To this the Plaintiff filed a replication to the *defense au fonds en fait*, and a general answer to the peremptory exception, and pleaded by special demurrer to the peremptory exception, in manner following :

And the said Plaintiff by protestation, and not admitting or confessing any of the allegations, matters or things, in the plea of perpetual exception peremptory in law of the Defendants in this cause filed, contained, saith ; that the said plea, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said Defendants to maintain their said plea, or to have the action of the said Plaintiff in this cause dismissed ; and that the said Plaintiff is not bound by law to answer the same.

And this the said Plaintiff is ready to maintain and verify.

Therefore by reason of the insufficiency of the said plea in this behalf, the said Plaintiff prays judgment as he has

already prayed in and by his declaration in this cause filed, and that the said Defendants be barred from maintaining their said plea ; and that the said plea be dismissed with costs.

And the said Plaintiff according to the form of the rules and orders of practice of this Honorable Court, in such case made and provided, states and shews to the Court here, the following causes and grounds of demurrer to the plea, that is to say :—

*First.*—Because the tenth section of the said Election Petitions Act of 1851, recited in the said plea of the said Defendants, is not, as pretended by the said Defendants, restrictive of the absolute and undoubted right of the Plaintiff to recover of and from the Defendants, as the parties upon whose application to the Select Committee, in the said Act, and in the declaration of the Plaintiff, and in the said plea mentioned, the Plaintiff was appointed Commissioner for the purposes in the said Act and declaration also mentioned, the amount by him demanded in the present cause ; but the said section merely gives to such Commissioner an additional security for the payment of the amount to become due to him, and a right of action against the sureties who may have entered into the recognizance in the said Act and plea mentioned, over and above that afforded against the petitioners ; and because the said section does not provide, or enact, or state, that when such recognizance shall have been entered into, no other recourse shall be had by any such Commissioner than upon or under such recognizance, nor that the petitioners shall be released or absolved from pecuniary responsibility, and because by other sections of the said Act, other parties who also have a right of action under the said recognizance, can nevertheless also enforce payment of their claims against

the petitioners, long before any claim under such recognizance could be enforced.

*Secondly*.—Because the one hundred and thirtieth section of the said Act, also in the said plea recited, is not suspensive of the claim or right of action of the said Plaintiff, and the provisions thereof do not and cannot prevent him from bringing his present action at this time ; and because by the provisions of the said Act, the said Plaintiff was not, and is not, bound to await the making of the final report by the Select Committee in the said section mentioned in the Election Petitions in the said declaration, since the amount allowed the Commissioner by the said section for his services on the commission, and for his travelling expenses, are due by the party or parties on whose application to the Select Committee, such Commissioner was appointed, and not merely by the party who may be condemned by the Select Committee in their said final report to pay the costs and expenses when the opposition of such last mentioned party has been judged to be frivolous and vexatious ; and because it is moreover alleged in the said plea, that by reason of the dissolution of Parliament, such final report was not, and never could be made by the said Select Committee in the said declaration and plea mentioned.

*Thirdly*.—Because the one hundred and thirty-ninth section of the said Act, in the said plea also recited, is not applicable to the case of the Plaintiff, who was appointed such Commissioner upon the application of the Defendants, but is solely applicable to cases in which the costs and expences may have been adjudged by any Select Committee to be paid, or which otherwise might become payable under the provisions of the said Act to any party prosecuting or opposing any Election Petition, or to any witness summoned to attend before such Committee, and not to the case of a Commissioner like the Plaintiff ; and because the costs and

expenses of the party prosecuting or opposing any such Election Petition, or of any such witness, are not fixed defined, or regulated by the Act, and have therefore, in the language of the said section, to "be ascertained" in the manner by that same section provided ; whereas the amount and allowance of the Commissioner are fixed, defined and regulated by the one hundred and thirtieth section above mentioned ; and cannot therefore be subject to be in any other way ascertained ; cannot be charged, and need not be stated by whom the same are to be paid, since by the Act itself they are declared to be due the Commissioner by the parties on whose application the said Commissioner shall have been appointed ; and because finally, the said one hundred and thirty-ninth section fixes a different period for applying for the payment of the costs or expences referred to therein, to wit, not later than three calendar months after the determination of the merits of the Election Petitions ; whereas the one hundred and thirtieth section, which has reference to the payment of the Commissioner's services, provides, that he shall be entitled to such payment immediately after such final report shall have been made.

*Fourthly*.—Because the one hundred and thirty-fifth section of the said Act, also in the said plea recited, is no answer to the Plaintiff's demand, inasmuch as it assumes that the costs and expences incurred by the Defendants as petitioners, could only be ascertained in the manner in the said one hundred and thirty-ninth section described ; whereas that section is only applicable to a totally different class of individuals and cases.

*Fifthly*.—Because the allegation in the said plea that the Defendants entered into recognizances as therein mentioned for the payment of all costs and expenses, which, under the provisions of the said Act, should or might become payable by them upon their respective petitions aforesaid, to any

party entitled to receive the same, is no answer to the Plaintiff's demand, inasmuch as the giving the said recognizances, or entering thereinto, did not affect the Plaintiff's right to recover from the petitioners, to wit, the Defendants, the amount of the demand he would become entitled to, upon the performance of his services ; and because, moreover, the present action is not brought upon, nor has the same any thing to do with the same recognizance.

*Sixthly*.—Because it is no answer to the Plaintiff's demand that, as the Defendants allege, by the evidence taken by and before him as such Commissioner, Dunbar Ross one of the said Defendants, established a legal majority of votes over John Greaves Clapham, the sitting member for the County of Megantic, in the said plea mentioned, and that in consequence thereof, the said Dunbar Ross should have been legally returned and elected as such Member ; inasmuch as no conclusion drawn from that fact having been established, could or can warrant a refusal on the part of the Defendants to pay the Plaintiff.

*Seventhly*.—Because in order to vest jurisdiction in this Honorable Court in the present matter, and to give a right of action to the Plaintiff, it was not necessary that the said Select Committee should have previously made their final Report to the Commons House of Legislative Assembly of this Province on the merits of the said Election Petitions, or either of them, nor that the charges made by the Plaintiff should have been ascertained in any other way than by that already ascertained and regulated by the said Act itself, nor that the costs and expenses should have been adjudged by the said Select Committee to be paid by either of the parties concerned, or interested in the prosecution or opposition of the said Petitions, to the other, or that any certificate of the same should have been required.

*Eighthly*.—Because the dissolution of the Parliament and the discharge of the said Select Committee, and the incapacity

of the latter body to make a final Report or adjudication, could not and did not oust the Plaintiff of his already acquired right to be paid for services performed by him, completed, and the result thereof, together with all his proceedings, returned to the Speaker of the said House before that dissolution and discharge ; and because the right of the Plaintiff was not and is not dependent on any such final Report or adjudication, nor dependent upon the powers of the said Select Committee to ascertain any costs or expenses incurred, nor on the obtaining of any certificate of such costs or expenses having been awarded.

*Ninthly.*—Because the allegations contained in the said plea, that by reason of no final Report or adjudication having been made by the said Select Committee, the said Defendants were prevented and debarred from demanding or receiving from the said Sitting Member, their full costs and expenses incurred in prosecuting the said Election Petitions, is no answer to the Plaintiff 's demand, inasmuch as the right of action of the Plaintiff accrued on the application of the said Defendants for the appointment of a Commissioner, and the sum now demanded of them, became and would be due and payable by them, even though, by the final Report or adjudication of the said Select Committee, such costs and expenses would not or could not have been recovered from the said sitting Member by the said Defendants ; and because the said costs and expenses of the Defendants could only have been recovered from the sitting member in case the said Select Committee had reported that the opposition by the said sitting Member, to the said Petitions of the Defendants, had been frivolous or vexatious : and because the said Select Committee were not bound, even though the Defendants had established a legal majority of votes for the said Dunbar Ross, and that the said Dunbar Ross should have been returned as member, to report that such opposition was frivolous or vexatious, but was a point on which they could report affirmatively or negatively as they thought right.

*Tenthly.*—Because the right of the Plaintiff to his present action is in no wise Dependent on the faculty, exercise of, or power to resort to a remedy by the Defendants, to be reimbursed by any other party, the amount due the Plaintiff.

*Eleventhly.*—Because the dissolution of the said Parliament was an exercise of the Royal Prerogative, an act over which the Plaintiff had no control.

*Twelfthly.*—Because such act could not in law deprive the Plaintiff of his right of action before this Honorable Court for the recovery of his present demand, for services by him performed long antecedent to the period of such dissolution.

*Thirteenthly.*—Because were the pretensions of the Defendants maintained, the Plaintiff would be in the position of an individual who having performed work and labor for the Defendants, at their instance and request, and expended monies for them at their like instance and request, is nevertheless unable to compel payment therefor by legal means, and would therefore suffer a great wrong without having any remedy.

The facts alleged by the Plaintiff and Defendants respectively were admitted.

#### Judgment—

The Court having heard the parties by their respective Counsel, as well upon the plea of demurrer in this cause filed by the Plaintiff to the plea of perpetual exception of the Defendants, as finally upon the merits of the present case :— Considering that the services set forth in the Plaintiff's declaration, as the ground of demand, are alleged to have been rendered in obedience to a commission to him directed as one of the Circuit Judges of Lower Canada, by a Select Committee of the Legislative Assembly of this Province, acting under the authority of the "Election Petitions Act of 1851,"

and to whom had been referred certain Election Petitions of the said Defendants, in the said pleadings referred to, and that the then existing Parliament of this Province was, on the twenty-third day of June now last, and during the continuance of the parliamentary contestations raised upon the said Election Petitions, dissolved by proclamation of the then Governor General of this Province, whereby the said Select Committee of the said Legislative Assembly, appointed to try the matters referred to them in and by the said Election Petitions, were prevented and for ever precluded from making a final report in the premises, as required by the said Act, and that the several other formalities and conditions therein prescribed, in reference to the certifying of the costs incurred upon the said contestations, and the party or parties thereto, who ought or might by law be adjudged to pay the same, conformably to the provisions of the said Act, were not observed and fulfilled in consequence of the said dissolution ; it is therefore considered and adjudged, by the Court of our Lady the Queen, now here, that the several allegations of the said declaration have been well and sufficiently answered by the causes, matters and things pleaded in and by the said exception of the said Defendants, and duly admitted and proved in this cause, and that, by reason thereof, the action of the said Plaintiff, in this behalf, be hence dismissed with costs.

**POPE and R. POPE, for Plaintiff.**

**Ross, DUNBAR, for Defendants.**

**STUART, ANDREW, Counsel for Defendants.**

QUEEN'S BENCH. } DISTRICT OF QUEBEC.  
APPEAL SIDE.

Before ROLLAND, PANET and AYLRWIN, Justices.

No.67. { SCOTT, Plaintiff in the Court below, Appellant,  
and  
HESCRUFF, Defendant in the Court below, Respondent.

The Respondent, as master of a Vessel, had brought from Liverpool, a quantity of galvanized metal deliverable at the Port of Quebec, to "order or assigns," and no consigned being found, the Respondent sent, among others, to the Appellant, to ascertain if he was the importer, the latter answered that he expected a quantity of metal, but not having received any advice of its arrival, he would not take it. The Statute regulating the Customs requires, that importers should, within five days after the arrival of the Vessel, land the goods and pay the duties thereon, and that in default thereof, it shall be lawful for the Officers of Customs to convey such goods to the Customs' warehouse. The metal was kept on board for 12 days after arrival, and by authority of the Collector of Customs, conveyed in an order to the Officer of that Department on board, directing him to land the metal and convey it to the Customs' warehouse, the metal was landed on the wharf, where it lay for some days exposed to the rain and weather, by the action of which it was damaged; and the Appellant having sued for these damages it was—

Held:—That the Respondent had fully complied with the terms and conditions of the Bill of Lading, that there was no negligence or carelessness on his part, and that he was not responsible for these damages.

L'Intimé, maître d'un Navire, avait apporté de Liverpool, une quantité de métal galvanisé qui devait être livrée dans le Port de Québec, "à ordre," et le consignataire n'ayant pu être trouvé, l'Intimé fit des perquisitions pour le découvrir, et, entre autres, fit demander à l'Appelant s'il en était l'importateur, auquel celui-ci répondit qu'il attendait de tels effets mais qu'il ne les prendrait pas, vu qu'il n'avait reçu aucun avis de leur arrivée. Le Statut qui règle les droits de Douane exige, que tout importateur devra, dans les cinq jours qui suivront l'arrivée d'un Navire, faire mettre à terre ses effets et payer les impôts sur ceux, et qu'à défaut de ce faire, il sera loisible aux Officiers de Douane de transporter telles marchandises au magasin des Douanes. Les marchandises furent gardées à bord pendant douze jours après l'arrivée du Navire, et après ce délai, par ordre du Collecteur à l'Officier de Douane à bord, lui commandant de faire mettre à terre ces marchandises, et les transporter au magasin des Douanes, elles furent déchargées sur le quai, où elles restèrent pendant quelques jours exposées au mauvais temps, et furent endommagées, et l'Appelant ayant institué une action en dommages il fut—

Jugé:—Que l'Intimé s'était entièrement conformé aux termes et conditions du Connaissment, qu'il n'y avait aucune négligence ou manque de soins de sa part, et qu'il n'était pas responsable de ces dommages.

Judgment rendered the 12th October, 1852.

This was an appeal from a judgment rendered by the Superior Court, sitting at Quebec, on the 26th July, 1852, dismissing the Appellant's action, instituted for the recovery of damages alleged to have been caused by the act of the Respondent, to a quantity of galvanized metal, belonging to

the Appellant, shipped at Liverpool on board of the vessel of which the Respondent was Master. (1)

The Appellant's declaration in substance alleged, that Morewood, Brothers and Co., of Liverpool, (who also traded at New York,) shipped 96 bundles of galvanized metal in good order, of the value of £239, on board the ship "Glenswilly," of which the Respondent was master, on the 27th February, 1851, at Liverpool, and that the Respondent, as master, undertook to convey the same thence to Quebec, to be delivered there, unto order, or their assigns. That the shippers subsequently endorsed the bill of lading signed by the Respondent, and delivered it to the Appellant. That the Respondent upon the arrival of the ship at Quebec, landed the said metal upon one of the wharves, without notice to the Plaintiff, or without advertising for a consignee, according to usage and custom at the port of Quebec, and that while on the wharf, the Respondent so negligently and carelessly conducted himself with respect thereto, that it became damaged by rain, causing a loss to the Appellant of £250, for which sum a judgment was prayed.

The Respondent pleaded a *défense au fonds en fait*, expressly denying the truth of each and every allegation of fact set forth in the declaration.

The evidence established that the bill of lading was to order, or their assigns, and had been endorsed to the Appellant, without any knowledge thereof having been given to the Respondent. The Glenswilly arrived at Quebec, on the 9th May, 1851, and a Custom House Officer was then placed on board, who remained until the whole of the cargo had been discharged. The consignee, being unknown to the Respondent, caused inquiries to be made among parties who were likely to be importers of galvanised metal, in order to discover the owner ; among others, the Appellant was called

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(1) 2 L. C. Rep. p. 477.

upon, and informed that 96 bundles of galvanized metal were on board from Liverpool, and he was asked if he were the consignee, he replied that he was expecting that quantity of metal from Liverpool, but that not having received any advice of the shipment on board the Glenswilly, he could not take it. An advertisement for a consignee had been posted up in the Exchange. After the lapse of twelve days an order was procured from the Collector of the Customs, addressed to the Custom House Officer on board, directing him to land the metal and convey it to the Customs warehouse. The metal was landed on the 21st May, and placed on a wharf, where it remained until the 26th, when the Appellant claimed it, having received the day before (sunday) a letter from the New York firm inclosing the bill of lading, and stating that in consequence of an error on the part of the Liverpool shippers, the bill had been sent to a wrong party. During the interval between the 21st and 26th, the metal had been damaged by rain to the amount of £87. The Custom House Officer, Treinor, who had been on board, deposed, that the metal could not have been landed without his permission, and that he would have had it sent to the warehouse, but was prevented by press of business ; that it was then under the control and responsibility of the Custom House authority, and that while the metal was on the wharf, a watchman from the Custom House had charge of it.

HOLT, for Appellant : The responsibility of the Respondent did not terminate when the galvanised metal in question was placed upon the wharf ; and the Respondent was not discharged from the custody of the goods, not having made a delivery or advertised for a consignee in the usual way ; he was bound to take care of the goods when he placed them upon the wharf, the owner not being there to receive them. (1)

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(1) 1 Valin, Liv. III, Tit. II, Art. V., des Connaissements, p. 636, in note :—2 Parc'esus, Cours de Droit Com. No. 728, p. 157 :—2 Boulay-Paly, p.

If it should appear to this Court that, at the time when the goods in question received the damage complained of, the owner (the Appellant) had not taken possession of them and had not terminated the custody of the carrier, (the Respondent) by any act or direction, the Appellant conceives that the cited authorities will be regarded as having a direct application to the point, and as fixing upon the Respondent the legal liability for the injury sustained by the goods.

The Judgment of the Court below sets forth as one of its grounds, that " the said Plaintiff *did not, within five days* " after the arrival of the Ship "Glenswilly," in which the "ninety six bundles of galvanized metal mentioned in the Plaintiff's Declaration were imported, *cause the said ninety-six bundles of galvanized metal to be entered inwards*, as by "law he was bound to do." It is in evidence and admitted on all hands that the vessel arrived at Quebec on the 9th of May. The Plaintiff received no intelligence of his goods being on board until the 25th of that month, (a Sunday) and, the next morning, caused the necessary entry to be made. It is for this Honorable Court to say whether the non-performance on his part of what may be considered an impossibility, can reasonably or legally be urged as a *motif* for a Judgment against him. The 12th Section of the Provincial Act, 10 and 11 Vic. cap. 31, does certainly require the importer of goods, by sea, to enter inwards and land them within five days after the arrival of the importing vessel, but, the Appellant respectfully submits, this is not to be understood as changing or affecting in any way the law as it regulates the respective and mutual rights and obligations of the ship-master, and of the owner of the goods entrusted to him. The Statute in question had in view, in the Section adverted to, the protection of the revenue only, and was

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324 :—Story on Bailments, Ch. vi, §§ 542, 543, 544, 545 :—Angell on Carriers' §§ 315 325, 291, 295, 304 :—1 Abbott on Shipping [6th American Ed.] Part IV Chap. V, pp. 466, 467, 468 :—7 Man and Gr. 850—Bourne vs. Gallifet.

never intended to shift the care of merchandise, before delivery, from the former, to the Custom House authorities.

The Court below considered the goods as having been, at the time they received the damage, "in the custody and possession of the officers of Her Majesty's Customs." With due respect for the opinion of that Court, the Appellant contends that there is no evidence in the record, shewing that the Custom House ever took possession of the goods. The Collector, Mr. Dunsecomb, says that he granted a special permit to land. This permit was exhibited to the tide-waiter on board, and the goods were thereupon put upon the wharf. The tide-waiter says "I allowed the iron to be landed on the wharf." The metal was landed on the 20th May. He left the vessel on the 24th. Up to that time, he says, he had not time to look after it, and when he left he reported to Mr. Alleyn, one of the landing-waiters, that it was still on the wharf, and that Mr. Alleyn said he would look after it. It appears, upon cross examination, that this witness (Treinor) was a stranger in Quebec, and that the "Glenswilly" was the first vessel he had ever been on board of as a *Custom-House Officer*. His duty was simple enough, being limited to seeing that nothing was discharged from the ship without a permit, but he seems to have considered himself as an officer of far higher grade and importance, and to have looked upon the "whole cargo" as under his "control" and "responsibility." It is a somewhat singular feature in the case that the Respondent should have contented himself with the evidence of this inferior officer, and should have declined to receive the testimony of Mr. Alleyn, the landing-waiter alluded to (whom he served with a *subpoena duces tecum*) and of Mr. Newton, a Custom House broker, when they attended in Court in obedience to his subpœnas. The tide-waiter says that he returned the order or warrant, together with the other papers, to the landing-waiter, Mr. Alleyn. That gentleman was surely the proper person to

account for its loss or explain its nature, and to state what was actually done in the matter. The calling of him as a witness and then refusing to examine him is significant. The Respondent concludes that the Custom House took possession of the iron, because the witness Treinor says that he would have looked after it if he had had time and that Mr. Alleyn said he would see about it; and this is all the evidence, touching possession by the Custom House, which is to be found upon the record.

But, the Appellant submits, even had the Custom House authorities taken possession of the goods (which they could only have done in order to secure the duty,) this would not have been a good answer in the mouth of the Respondent to the Appellant's claim. Misconduct on the part of the Custom House with reference to the goods, might have fixed upon that department a liability in damages to the ship-master from whom the goods were received, but could not have been set up as a defence by the latter in an action for the non-delivery of the goods.

At the hearing upon the merits in the Court Below, the Defendant's Attorney contended that the holder of a bill of lading has no action against the ship-master for damage done by him to the goods. The Court did not express an opinion upon this question, but the Appellant believes that a reference to the authorities which bear upon it, will show that such an action well lies. (1)

**POPE**, for Respondent : The obligation entered into by the Respondent is evidenced by the bill of lading being sought to be enforced, the first question which presents itself, is to ascertain by the laws of which Country this obligation or contract is to be governed. The bill of lading was executed

(1) Cond. Louis. Repts. p. 302, Morgan *vs.* Bell :—1 Pardessus, *Gours de Droit Com.*, No. 314 :—2, No. 728 :—1 Valin, pp. 659, 660, 665 :—1 Abbott on Shipping, [Sixth Am. Ed.] p. 404 :—1 Smith's Leading Cases, pp. 401, 406 :—8 Term Repts., p. 322, Dawes *vs.* Peck :—Holt on Shipping, pp. 377, 398.

in England, and it should be remembered that the parties to the contract (the Shippers and the Respondent) are residents in that Country, and therefore not to be presumed as entering into a contract to be governed by laws wholly different from their own, and of which they could have no knowledge. Without presuming to offer a decided opinion upon this point of law, I would nevertheless submit, that the contract entered into by him was one which must be governed by the law of England. The following authorities would seem to favor this view. " Si l'Acte contient la date d'un lieu, il est naturel de croire que les parties ont voulu en suivre les formes : car chacun des contractants pouvant ignorer la loi en vigueur dans le domicile de l'autre, ils sont présumés vouloir suivre celle du pays où ils traitent." (1)

" The place of making a contract should be considered in expounding it." (2)

If then, the contract in question is to be governed by the law of England, it would follow that the obligation or contract of the Respondent is not transferable, and that, in consequence, the Appellant cannot maintain any action on the bill of lading. An action would lie against the Respondent by the shippers with whom he had contracted, but not with the Appellant.

In support of this doctrine, the Respondent would refer to the case of Thompson vs. Dominy (3). " A bill of lading is not negotiable like a bill of exchange, so as to enable the Indorsee to maintain an action upon it in his own name, the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself."

(1) 4 Pard. Droit Com. Nos. 1486, 1490.

(2) Harrison's Digest, p. 1609.

(3) 14 Messon and Walsby, p. 402.

Whatever may be the contract between the Consignor and Consignee, the *agreement for the carriage* is between the *carrier* and the *consignor*. (1)

A transfer of the property "is very different from a transfer of the contract," said Lord Tenterden in *Sargent vs. Morris*. (2)

Mr. Justice Yates held a similar view of this difference. (3)

Throughout the whole of Abbott's Work on Shipping, it will be found that wherever language is used which might seem on a superficial examination to admit the right of action in the consignee on the contract itself, that, nevertheless, such is not the case, since the examples cited are confined to actions for trover, where the property of the goods only was claimed. Should this view be held by this Honorable Court, this case would end here.

If on the other hand, the Court should be of opinion that the contract in question is to be governed by the law of the place where it was to be executed, it may be argued that the obligation is transferable. Although the authority does not, it is submitted, go so far. "Le connaissement peut être au 'porteur.....; il peut être à ordre, et.....celui à qui il "est transmis par voie d'endossement, est saisi de suite de la "propriété des marchandises y énoncées." (4) This goes no further apparently than the English doctrine. If however it be maintained that under the French system, the contract is transferable, it is manifest that such transfer could only be made in conformity with the rules of that system.

"L'endossement doit être daté, cette première condition ..... "s'applique aux endossements,.....sans aucune "modification." (5)

(1) Abb. on Shipping, p. 412.

(2) 3 B. and Ald. 273 :—Abb. on Shipping, p. 412 :—Story on Agency, p. 345.

(3) Abbott on Shipping, p. 635.

(4) 2 Pard. Droit Com. No. 728.

(5) 1 Pard. Droit Com., No. 343.

"L'endossement doit encore exprimer la valeur fournie."(1)

Neither of these essential conditions has been complied with in relation to the bill of lading or indorsement now before the Court. The indorsement is simply "Deliver to Henry S. Scott, Esquire, Quebec, or Order, Morewood, Brothers and Co." No proof was offered by the Appellant to show that he had given value or consideration for these goods or for this bill. Indeed under the circumstances, the Respondent could not have maintained an action for freight against the indorsee, and if not, then there was no mutuality between them. As well from the nature of the indorsement, as from the failure of proof, it may safely be averred that in law, the Appellant could only be regarded as the agent of the Shippers ; and "If the person to whom the delivery is "ordered, is only agent of the shipper, and has no property "in the goods, it has been thought that he cannot maintain "an action *in his own name*, against the master for not "delivering them. Not in *assumpsit*, for the contract in the "bill of lading was not made with him, but with a third "person, the consignor of the goods. Not in trover, because no "property having passed to him, he can have no right to "complain of their non-delivery or conversion as an injury "to himself," (2) and also : "The indorsement of a bill of "lading without consideration, does not transfer any property "in the goods, the mere indorsement of a bill of lading by "the consignor to an agent, to authorize him to stop the "goods *in transitu*.....will not enable such agent to "maintain *assumpsit* or trover for the goods in his own "name :" (3) Now no consideration was ever given, nor is it even pretended that any was given for these goods or for this bill.

(1) 1 Pard. Droit Com., No 515.

(2) 1 Camp. 369, Waring vs. Cox.

(3) 4 East 211, Cox vs. Harden :—Story on Agency, pp. 340, 356.

There is no evidence whatever to shew that the metal was damaged by salt. The Appellant, as well at the *Enquête* as at the hearing on the merits before the Court below, formally declared that he abandoned that allegation of his declaration which set forth damage from this cause. The next point to be taken up is the Appellant's allegation that, by the custom of the port of Quebec, the Respondent was bound to give notice, demanding a consignee, as well through the papers as at the Exchange.

In answer to this, the Respondent submits that such is not shewn to be the general custom at the port. The Appellant's own witnesses shew that no such general custom exists. Apart from this, the Respondent maintains that to prove a custom, it is not merely necessary to state that it exists, but *instances* thereof must be proved.

"A usage of trade must be proved by instances." (1)

"Usage of trade is a general and prevailing course of business, and witnesses who are called to prove it, should cause their minds to revolve over instances known to them "of its having been acted on." (2)

Now the Appellant has not proved a single instance to establish the custom alleged ; therefore his allegation fails.

Besides, the Respondent contends that he was not bound to give notice. "Although, by the bill of lading, the goods "are deliverable to merchants in London, whose residence "is well known, no notice to them of the ship's arrival is "necessary to render them liable for demurrage." (3)

"Where a bill of lading of goods, by a general ship, "deliverable to order, contains a stipulation that the goods "are to be taken out in a certain number of days after arrival,

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(1) Pritchard's Adm'y Digest 153.

(2) Harrison's Dig. Customs and Prescriptions, p. 2278.

(3) 4 Camp. 161, Harman *vs.* Mant.

" or to pay demurrage, the indorsee of the Bill of Lading, " who takes out the goods, is liable for demurrage from the " expiration of the days calculated from the arrival of the " ship, without receiving any notice of that event." (1)

Apart, moreover, from the circumstance that the custom of the port of Quebec has not been established to be what the Appellant alleged it was, the reverse is clearly proved, and instances are given by the Respondent of a different custom. Now, " if a custom be set forth generally, and it be proved " that there are exceptions, it is a fatal variance." (2)

But the Respondent is enabled to take higher ground, for the Appellant only asserts the custom to advertise in the papers as well as in the Exchange. The only object sought for in these advertisements is to find the consignee. The Appellant's own witness clearly establishes that the notice in question was posted up in the Exchange for several days before the metal was landed, and he proves a notice given to the Appellant of an infinitely more certain description than any insertion in a newspaper, for this witness called on the Appellant in person to ask him if he were the consignee of these very 96 bundles of galvanized metal from Liverpool : while he also proves that the Appellant said that he was then expecting that very quantity of that metal from Liverpool. Indeed the letter from New York shews that the Appellant had ordered that metal himself. No better notice could be given to the Appellant. It is idle therefore to insist on a mere formality.

The next point which the Respondent submits is, that his responsibility in relation to this metal ceased by landing it on the wharf.

" The manner of delivering the goods, and consequently " the period at which the responsibility of the master and

(1) 4 Camp. 159. *Harman vs. Clarke.*

(2) *Pritchard's Adm. Dig.* 153.

"owners will cease, depend upon the custom of particular places and the usage of particular trades." (1) A reference is made by the author to the *Ordonnance de la Marine* (2) which will presently be adverted to. But the usage of a particular place cannot vary the general law. (3)

Now, no custom, it has already been shewn, has been proved. The law therefore must decide the matter.

"With respect to goods coming from a foreign country, it was said by Mr. Justice Buller, that the Bill of Lading was only an undertaking to carry from port to port, and that according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the master." (4)

On referring to the *Ordonnance de la Marine*, (5) the diversity of custom referred to will be observed; but it is shewn, nevertheless, that in the several ports mentioned by the author, the master is discharged from all responsibility when the goods are landed on the wharf. In speaking of those who are to receive the goods, he says: "A la décharge, il les font prendre tout de même sur le bord du navire par leurs portefaix pour les descendre au quai, et dès lors aussi elles sont à leurs risques, sans rien imputer au maître s'il survient des avaries en descendant du navire. A Marseille, c'est au maître à rendre les marchandises au quai, après quoi il est quitte. Sentence du 16 Juillet, 1748."

Valin goes further. He says: "Le registre des commis de la douane fait foi de la décharge des marchandises sur le quai, à quoi se borne l'engagement que le maître a contracté par le connaissance, après avoir averti néanmoins

(1) Abt. on Shipping 463.

(2) 1 Valin p. 530.

(3) Cald. 444 Rex vs. Saltern,

(4) 5 Term Rep., 267 Hyde vs. Trent and Mersey Navigation Company.

(5) 1 Valin p. 530.

" tous les intéressés au chargement de se trouver sur le quai " à la descente de leurs marchandises, pour qu'ils aient " respectivement à les faire enlever." (1) It has been shewn that a personal notice was given to the Appellant. The Bill of Lading being to order and the Respondent being unable to discover the consignee, could do no more.

" Le maître est toujours déchargé lorsqu'il paraît par les registres qu'il a fait mettre à quai toutes les marchandises " portées par ses connaissances." (2)

" La règle ordinaire est que les effets des marchands chargeurs doivent leur être rendus à quai." (3)

" Les marchands &c., ne pourront laisser sur les quais leurs " marchandises plus de trois jours, après lesquels elles seront " enlevées à la diligence du maître du quai.....aux " dépens des propriétaires." (4) This authority supposes the possibility of consignees not removing or claiming their goods ; and yet for three days they are exposed on the wharf. At page 459, it is shewn that the same rule applies to " des " effets dont les propriétaires ou commissionnaires ne sont " pas connus."

The next point to be considered is, which party had a better lien on the metal. That is to say : Was the lien of the Custom House on this metal for securing the revenue better or of a more privileged nature than that of the Respondent for his freight ? And, secondly, if such were the case, could the Custom House take possession thereof ? Both these questions, it is submitted, must be decided in the affirmative.

The Respondent, under the law of France, could not retain the goods in default of the payment of his freight ; he

(1) 1 Valin, Ord. de la Marine p. 636.

(2) 1 Valin, p. 636.

(3) 1 Valin, p. 637.

(4) 2 Valin, p. 438.

could only demand that they should be deposited in the hands of a third party until his dues had been satisfied. (1) Who this *dépositaire* must be, under the law of Canada, will be presently shewn.

The English law is different on this point, for under that system, the master may detain any part of the merchandize for the freight. (2) Again "if the goods are landed or sold by "the Officers of the Customs, the freight not having been "paid, the produce of the sale is to be first applied to the "payment of the freight." (3) This doctrine is consonant to that of the French law, by which the master's lien "passe "même avant le privilége du trésor public, pour les droits "de douanes et autres semblables." (4) The law of Canada is wholly different. This difference on various points of law in England and France is alluded to here, only to show that the authorities cited from the respective systems of those Countries ought to be received with caution, since in Canada the law is so very different, and in so far as this case is concerned, is completely applicable to the facts.

On reference to the Customs' Act, (5) the priority of the lien of the Customs is declared. For it is enacted that if the goods be not entered and the duties paid, they shall be taken to the warehouse, by the Officers of Customs, "And if such goods be not duly entered and the duties due thereon paid within three months from the date of such warehousing, together with all charges of removal and warehouse rent, the same shall be sold by public auction to the highest bidder, and the proceeds thereof shall be applied, FIRST, to the payment of duties and charges, and the overplus, if any, after discharging the vessel's lien, shall be paid to the owner of the goods."

(1) 2 Pard. n. 719.

(2) Abb. on Shipping, 461.

(3) Imp. Stat. 6 Geo. IV. Cap. 107. S. 134:—Abb. on Shipping p. 462.

(4) 2 Pard. n. 962.

(5) 10 & 11 Vic. Cap. 31. Sec 12,

It therefore follows that the Custom House had a prior lien, and could therefore take possession of the metal for securing the payment of their duties and charges.

The only other point to be examined is, whose duty it was to send the metal to the Customs' Warehouse. It will be remembered that the "Glenswilly" arrived at Quebec on the 9th May, and a Custom House Officer was sent on board that day, that the metal was only discharged on the 21st May, that is to say, twelve days after the arrival of the ship, that during that time, the Appellant made no entry thereof, and that the Custom House was in charge of the same. The clause already referred to (1) is conclusive on this point, and the duty and rights of the Officers of Customs are clearly defined. "And be it enacted, that every importer of any "goods by sea, or from any place without this Province, shall, "within five days, after the arrival of the importing vessel, "make due entry inwards of such goods, *and land the* "same.... And the person entering any goods.... shall, at "the same time, pay down all duties, due upon all goods "entered inwards ; and the Collector, or other proper Officer, "shall immediately thereupon grant his warrant for the "unloading of such goods, and grant a permit, &c. And in "default of such entry and landing, or production of such "goods or payment of duty, **IT SHALL BE LAWFUL FOR THE** "OFFICERS OF CUSTOMS TO CONVEY SUCH GOODS TO THE CUS- "TOMS WAREHOUSE ; and if such goods be not duly entered, "and the duties due thereon paid, within three months from "the date of such warehousing, **TOGETHER WITH ALL CHARGES** "OF REMOVAL and warehouse rent, the same shall be sold "by public auction to the highest bidder, and the proceeds "thereof shall be applied, first, to the payment of duties and "charges, and the overplus, if any, after discharging the "vessel's lien, shall be paid to the owner of the goods."

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(1) 10 & 11 Vic. Cap. 31, Sec. 12,

Now as it was lawful for the Officers of Customs to take possession, so was it lawful for the Respondent to give them possession : He could not land without their permission, or move them any where, if he did so, the goods would have been forfeited, (section 8.) and being landed after the expiration of the five days, and the duties not having been paid, the Customs took possession in accordance with the provisions of the statute. The 59th section of this statute regulates the notice to be given by the Customs in relation to the public sale of such goods. The evidence clearly establishes the possession of the Officers of Customs ; the metal was no longer in the custody or possession of the Respondent, and when a delivery has been prevented, because the thing is no longer in the possession of the party who should make delivery, when he has been dispossessed thereof, the obligation to deliver ceases. (1)

Now, the Customs had a superior claim or lien on this metal. They took possession and maintained it over the Respondent. The Respondent, instead of only allowing five days, allowed a delay of twelve days to elapse before the metal was landed. After the lapse of five days, as the consignee had not appeared, the duty of removal devolved upon the Officers of Customs. Their own Officer was ordered to convey the metal to the Warehouse. He did not do so. The metal was then, while on the wharf, in the custody and possession of the Custom House Officers, and not in that of the Respondent, and any damage which may have been occasioned to it, is not attributable to him, nor can he be made liable therefor.

The Court below took this view, and on the 26th July 1852, rendered the following Judgment.

"The Court &c., Considering that the said Plaintiff did not within five days after the arrival of the ship "Glen-

(1) *Porthier, Vente, No. 60.*

"swilly," in which the ninety-six bundles of galvanized metal, mentioned in the Plaintiff's declaration, were imported, cause the said ninety-six bundles of galvanized metal to be entered inwards as by law he was bound to do; and considering that by reason thereof, and of the Defendant not having received any information from the shippers of the said ninety-six bundles of galvanized metal, or from the Plaintiff, being the person to whom the said ninety-six bundles of galvanized metal were to be delivered by the Defendant, he, the said Defendant, was justified in allowing the Officers of Her Majesty's Customs to take possession of the said ninety-six bundles of galvanized metal; and considering also that it is established by the evidence adduced in this cause, that, at the time the said ninety-six bundles of galvanized metal sustained the damage for which the said Plaintiff now seeks to make the Defendant liable, the said ninety-six bundles of galvanized metal were in the custody and possession of the Officers of Her Majesty's Customs, in consequence of the neglect aforesaid on the part of the Plaintiff, and had ceased to be in the possession of the Defendant, the Court doth dismiss this action with costs to the Defendant."

The Judgment on the appeal is as follows:

"The Court &c., Seeing that it is established in evidence that the said Respondent safely arrived and conveyed the galvanized metal mentioned in the declaration of the said Appellant, and landed and delivered the same in good order and condition upon the wharf at the Port of Quebec, and hath fully complied with the terms and conditions of the bill of lading declared upon, and that the said Appellant hath wholly failed to establish the negligence and carelessness by him complained of in his said declaration against the said

Respondent, and that in the judgment of the Court below there is no error : it is by the Court, now here, adjudged, that the said judgment appealed from, to wit : the judgment rendered in this cause by the Superior Court for Lower Canada, at Quebec, on the twenty-sixth day of July, one thousand eight hundred and fifty-two, be and the same is hereby affirmed. And it is further ordered, that the said Respondent do recover, from and against the said Appellant, his costs in the present appeal. And it is further ordered by this Court that the record be remitted to the Court below."

HOLT and IRVINE, for Appellant.

ROSS, DUNBAR, Counsel for Appellant.

POPE, THOMAS, for Respondent.

#### SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 956. { BUNKER,..... Plaintiff,  
vs.  
CARTER,..... Defendant.  
and  
RICHARDSON, ès qualités... Reprenant l'Instance.

*Held* — That an action cannot be maintained by a vendor against a vendee to recover an instalment due on the *prix de vente*, the deed containing a stipulation that the vendor should furnish to the purchaser, before payment of the instalment, a certificate from the Registrar of the County within which the land is situated that there are no mortgages or incumbrances on the land, *fascie* there being no proof that such certificate was furnished : notwithstanding *proof* adduced with the Plaintiff's answers to the pleas of a notarial receipt, not registered, dated previous to the sale, discharging the mortgage or *baileur de fonds* claim alleged by the Defendants pleas to exist on the land in question.

*Jugé* :—Qu'une action ne peut-être maintenue par un vendeur contre un acquéreur pour le recouvrement d'un instalment du sur un prix de vente. L'acte contenant une clause qui oblige le vendeur de fournir à l'acquéreur, avant le paiement de l'instalment, un certificat du Registrateur du Comté dans lequel l'immeuble est situé, qu'il n'existe aucune charge ou hypothèque sur la propriété, s'il n'est prouvé que tel certificat a été produit : et quoiqu'il soit prouvé par une quittance notariée, non enregistrée, antérieure à la vente, produite avec les réponses du Demandeur aux défenses du Défendeur que l'hypothèque ou privilège de bailleur de fonds allégué par les plaidoyers du Défendeur exister sur l'immeuble, est éteinte.

Judgment rendered the 30th May, 1855.

The action was brought to recover part of the price of a farm sold by the Plaintiff and his wife, Frances Richardson,

to the Defendant, by Notarial deed dated the 28th of June, 1854. The price was £200, of which £50 were acknowledged by the deed as paid, the remainder being payable as follows, viz : £50 on or before the 15th of August, 1854, (being the instalment sued for by the action,) £50 in one year, and the balance of £50 in two years from the date of the deed. The deed contains the following clause :

“And it is further agreed between the said parties, that the  
 “vendors shall furnish to the said purchaser a certificate in  
 “writing from the Registrar of the County of Chambly, that  
 “there are no mortgages or incumbrances on the said land  
 “and premises, before the payment of the fifty pounds  
 “hereinbefore payable on the fifteenth day of August next,  
 “shall be made ; and should, by such certificate, any mort-  
 “gages or incumbrances appear to exist on the said land  
 “and premises, the payment of fifty pounds aforesaid, and the  
 “subsequent payments, if necessary, shall be applied by the  
 “said purchaser in extinguishment of such mortgages or  
 “incumbrances, without any order in writing on the part of  
 “the said vendors being necessary for that purpose, and  
 “the receipt or receipts of such mortgage creditor on the said  
 “land and premises, shall be a full and ample discharge to  
 “the said purchaser, to the extent of such payment or  
 “receipt, on account of the consideration or purchase money  
 “herein mentioned.”

The Plaintiff, in addition to the allegation usual in similar actions specially referred in his declaration to the clause above cited, and alleged that he had furnished the Defendant with the certificate required.

The Defendant pleaded a *Défense au fonds en fait* and several exceptions.

*Firstly.*—That the promise to pay the instalment, sought to be recovered, was made only upon the condition of the vendors furnishing the Defendant with a certificate, as set forth in the clause ; that this certificate, although often demanded, had never been furnished.

*Secondly.*—That the promise to pay the instalment was made on the condition referred to, and that by the deed the vendors guaranteed the land *franc et quitte*, and undertook to defend the purchaser from all troubles, hindrances and mortgages : That under a deed of sale of the 29th May, 1837, from Debartzch to the Plaintiff, of the land in question, registered in the Registry Office for the County of Chambly, on the 12th October, 1843, a mortgage of £380 existed on the land in favor of Debartzch with a privilege of *Bailleur, de fonds*, in consequence whereof the Defendant was injured, *troublé*, and prevented from selling the lot, and that the Plaintiff had no right of action, until this mortgage was discharged.

The third exception contains allegations similar in effect to those set forth in the first and second exceptions, and further, that the vendors never furnished the certificate required by the deed, but exhibited to the Defendant a Registrar's certificate filed with plea, from which it appeared that the land remained mortgaged for the sum of £380, above referred to, which is alleged to be a *trouble* and damage to the Defendant, and without the removal of which the Plaintiff had no right to recover the sum sued for.

The allegations of the several special answers to the exceptions were to the effect that the clause relating to the Registrar's certificate established no condition precedent to the payment of the monies, but simply that a Registrar's certificate should be furnished, showing the mortgages in

existence on the property, to the payment of which mortgages the Defendant might by the Common Law, and without the clause in question, have applied the balance of the purchase money ; that the sale did not contain the clause of *franc et quitte*, but simply a clause of warranty against all mortgages, dowers, and other hindrances, and that the Defendant had been in no way legally troubled in the possession of the property ; that the pretended mortgage referred to in the exception had been, to the Defendant's knowledge, extinguished by a Notarial receipt from the heirs Debartzch, of the 27th June, 1846, (filed with the special answers) ; and that the Plaintiff *par reprise d'instance* had a right to claim payment of the instalment due.

Admissions were given by the parties that the Notarial receipt was signed by the heirs Debartzch, but was not registered previous to the institution of the action, and that the Registrar's certificate, filed by the Defendant with his plea was the only certificate furnished by the Plaintiff to the Defendant, and was so furnished *after its date*, the 4th July, 1854, without stating when.

The certificate is as follows :

“ Search against Isaiah Bunker of Chambly, 4th July, 1854 :

“ Registered, 12th October, 1843.

“ A deux heures et trois quarts P. M., P. Debartzch  
 “ apporte pour enregistrement un sommaire d'un acte de  
 “ vente par Pierre Dominique Debartzch à Isaiah Bunker,  
 “ de quatre lopins de terre situés dans le Village Debartzch,  
 “ pour la somme de trois cent quatre vingt livres, cours actuel,  
 “ hypothéquant le dit acquéreur pour sureté du payment de

"cette susdite somme, tous ses biens présents et futurs, et  
"spécialement les prémisses sus vendues."

**L'Acte daté 29 Mai, 1837.**

Here follow entries as to various other deeds, to and by the Plaintiff, not showing the existence of any mortgages on the land in question. The following certificate is added "I certify the foregoing to be extracts from deeds recorded in the Registry Office of the County of Chambley."

" Registry Office, Chambley, this fourth day of July, one thousand eight hundred and fifty-four.

" Signed,

" CH. MIGNAULT,

" *Deputy Registrar.*"

**The Judgment is in the following terms :**

" Considering that by the deed of sale in the Plaintiff's declaration set forth, it was specially stipulated and agreed between the said parties, that the said vendors shall furnish to the said purchaser a certificate in writing from the Registrar of the County of Chambley, that there are no mortgages or incumbrances on the said land and premises, before the payment of fifty pounds payable on the fifteenth day of August, then next, shall be made ; and that by reason of such stipulation, and by law, the Defendant before paying such sum was entitled to have from the Plaintiff a certificate or certificates, shewing whether any and what hypothecations were actually subsisting upon the land and premises, in and by the said deed described and sold, at the time of the sale thereof, and that the Plaintiff failed to furnish such certificate or certificates, or in any other manner to show that the said land and premises were free from hypothecation or mortgage and incumbrances, maintaining

"the exception of the Defendant in that behalf, doth dismiss  
 "the present action of the Plaintiff, with costs, *distrain* in  
 "favor of Messrs. McKay and Austin, Defendant's attorneys,  
 "reserving to the said Plaintiff *par reprise d'instance*, such  
 "further recourse, as by law he may be entitled to."

LAFLAMME, R. and G., for Plaintiff.

MCKAY and AUSTIN, for Defendant.

**SUPERIOR COURT.—MONTREAL.**

Before DAY, SMITH and VANFELSON, Justices.

No. 676. { HOLMES, ..... Plaintiff.  
 vs.  
 { CARTIER et al., ..... Defendants.

Held:—That under the 4th Section of the Registry Ordinance, 4th Vict., ch. 30, the Defendants, *donataires* of the land sought by the action to be declared hypothecated, are not purchasers or grantees for or upon valuable consideration, as mentioned in said Section, so as to enable them to invoke, as against the Plaintiff, the non-Registration of his original *titre de créance*, or the Registration of the judgment founded thereon, subsequent to the insinuation of the donation. That in the case submitted the Defendants were *donataires à titre gratuit*.

Jugé:—Que sous la 4e section de l'Ordonnance 4e Vict., ch. 30, les Défendeurs, *donataires* de la terre en raison de laquelle ils étaient poursuivis hypothécairement n'étaient pas acquéreurs pour ou sur valable considération, tel que mentionné en la dite section, de manière à ce qu'ils pussent invoquer, à l'encontre du Demandeur, le défaut d'enregistrement de son *titre de créance*, ou l'inscription du jugement fondé sur tel titre, à une époque subséquente à l'insinuation de la donation. Que dans l'espèce les Défendeurs n'étaient pas *donataires à titre gratuit*.

Judgment rendered the 28th June, 1855.

The Plaintiff in his declaration set up a Notarial obligation of the 11th of November, 1837, made by Augustin Cartier, in favor of Edward Henry, and transferred to the Plaintiff by deed of the 1st of March, 1841; also a judgment obtained by the Plaintiff against Augustin Cartier, on the 30th November, 1853, amounting, with interest and costs, to £51 15 0. The Debtor is alleged to have been proprietor in possession, at the date of the obligation, of a certain farm in the Baronne de Longueuil, in the declaration described. Conclusion against the Defendants, hypothecarily, as in possession of the property at the date of the institution of the action.

*The Defendants pleaded :*

1. *Défense au fonds en droit*, on the ground that there was no allegation of the registration either of the obligation or of the Judgment, or that the debtor was in possession or proprietor of the land at the date of the judgment, or that the Plaintiff had any hypothecary rights on the land. This *Défense* was dismissed;

2. An exception setting up a deed of donation before Notaries, of the 7th May, 1842, from the said Augustin Cartier, and wife, to their sons, the Defendants, of the land in question, subject to the payment of a *rente viagère* in favor of the donors :—the insinuation of the donation on the 24th of January, 1844, and the possession by the Defendants of the land in question, as proprietors, since the date of the donation :—that at the date of the registration of the judgment of the 13th October, 1854, the original debtor was not proprietor of the land in question, and that, consequently, no mortgage or hypothèque was created upon it by the judgment, nor could any exist under the obligation, it having never been registered ;

3. *Défense au fonds en fait.*

The Plaintiff by special answer to the second exception alleged, that the suit against the donor was pending at the date of the donation, and that the present Defendants were, at the time of the passing of the deed of donation, aware of the existence of the debt, and of the obligation. The evidence consists of the documents referred to in the pleadings, and of admissions given by the Defendants, that Augustin Cartier was proprietor of the land at the date of the obligation, and remained in possession till the donation was made to the Defendants, and that the Defendants had since remained and were in possession of the land as proprietors.

DAY, Justice : This case is to be decided on a point not raised by the pleadings or at the argument. The action is an hypothecary action founded on an obligation passed previous to the Registry Ordinance. This obligation creates a general mortgage, and under the 4th section of the Ordinance is subject to registration. The Defendants plead that they hold the land by a deed of donation from their father, duly insinuated, and that as the obligation was never registered, and the original debtor had parted with the land long before the rendering or registration of the judgment, no mortgage could be constituted in favor of the Plaintiff, on the land in question. We are of opinion that the *donataires* cannot raise this point. The Ordinance referred to declares that every Notarial or Judicial Act, privileged or hypothecary claim, not registered within the term limited by the Ordinance, " shall, after the lapse of the said period, be inoperative, " void and of no effect whatever, against any subsequent " *bond fide* purchaser, grantee, mortgagee, hypothecary or " privileged creditor, or incumbrancer, for or upon valuable " consideration." The Defendants hold by donation, and not for valuable consideration, as contemplated by the Ordinance, and the Plaintiff must therefore succeed.

Judgment—

" Considering that the Plaintiff hath established by evidence the material allegations of his declaration, and that the Defendants acquired the land and premises in the said declaration set forth, and hold and possess the same *à titre gratuit*, as donees of Augustin Cartier and Céleste Pataude, his wife, and are not purchasers or grantees for or upon valuable consideration, and by reason thereof, and by law, the Defendants cannot object or plead in bar of the Plaintiff's action that the obligation in his said declaration set forth hath not been registered, or cause the same to be dismissed for want of such registration, dismissing

"the exception of the Defendants, doth adjudge that the  
 "lots of land, mentioned and described in the declaration in  
 "this cause in manner following," etc....." be, and the  
 "same are hereby declared to be charged and hypothecated  
 "for the payment of the sum of fifty-one pounds, fifteen shil-  
 "lings and two pence, current money of this Province of  
 "Canada, due as follows, to wit :....." Here follows state-  
 ment of debt, and the usual provision for *délaissement* by the  
 Defendants, &c. (1)

LORANGER and POMINVILLE, for Plaintiff.

MOREAU, LEBLANC and CASSIDY, for Defendants.

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 • SUPERIOR COURT.—MONTREAL.

Before SMITH, VANFELSON and MONDELET, Justices.

No. 968. { FRASER, Plaintiff.
 vs.
 LOISELLE, Defendant.

Held:—That books of account, *titres de créance* and papers of the Defendant, in his possession, are exempt from attachment, *sont non saisissables*.

Jugé:—Que les livres de comptes, *titres de créances et papiers du Défendeur*, en sa possession, sont non saisissables.

Judgment rendered the 17th March, 1855.

A Writ of Attachment, before judgment, was issued in the cause, under which the Sheriff returned that he had seized in the Defendant's possession, amongst other things, a pine chest of drawers, *commode*. A petition was presented by the

(1) The clause in the Deed of Donation as to the *rente viagère* is as follows:

"Cette donation ainsi faite, à la charge par les dits Donataires de payer et acquitter les cens et rentes et autres droits seigneuriaux, d'où relèvent les dites prémisses, tant du passé qu'à l'avenir; en outre, à la charge par les dits Donataires d'avoir, pendant quatre ans, bien et duement soin des dits Donateurs à leur présente demeure, qu'eux dits Donateurs occuperont à l'ordinaire à leur volonté; après les dites quatre années, les dits Donateurs auront le privilége d'exiger des dits Donataires, tous les ans, le tiers des dites prémisses sus-mentionnées et des prémisses mentionnées dans un acte de donation des dits Donateurs au dit Constant Cartier, en date du vingt-deuxième jour de Mai, mil huit cent quatre-vingt-un, reçu devant les Notaires soussignés, ainsi que le tiers des droits des animaux des dits Donataires, à la charge par les dits Donataires de fournir, à la volonté des dits Donateurs, un cheval attelé sur voiture convenable au temps."

Plaintiff setting forth that at the time of the seizure the chest of drawers was locked, and that the Plaintiff had reason to believe it contained articles liable to seizure, which would be withdrawn by the Defendant, if not put under seizure, and praying that the Sheriff be authorized to break open the chest of drawers, and seize such of its contents as might be liable to seizure. The Defendant also presented a petition setting forth that the *commode* contained books of account, and papers and other articles *non saisissables*, and prayed for an order enjoining the Sheriff, Bailiff and *Gardien*, to permit the Defendant to have access to the *commode*, and that the articles *non saisissables* should be delivered up to him, the Defendant.

The Court, after hearing the parties, rendered Judgment, ordering the Sheriff to cause the *Commode* to be opened, and an inventory of its contents made, reserving to pronounce further on the petitions on receipt of the Sheriff's return.

The Sheriff having made his return, the Court on the 11th March, 1855, rendered Judgment granting to the Defendant *main-levée* of the seizure of the Books of Account, *Titres de créance et Acte*, mentioned in the return, and ordering the Sheriff to deliver them up to the Defendant.

BETHUNE and DUNKIN, for Plaintiff.

LAFLAMME, R. and G., for Defendant.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

No. 1030. { MCGILLIVRAY, Plaintiff,
vs.
GERRARD, Curator, Defendant.

Held :—That the Plaintiff, under the clause of the Will recited in the declaration, was not entitled to the sum of money sought to be recovered by the action, and that a bequest (on a contingent mentioned) giving her power of disposing of the sum by Will, does not vest the sum in her absolutely as proprietor.

Jugé :—Que la Demanderesse, en vertu de la disposition du Testament allégué dans la déclaration, n'était pas en droit de réclamer la somme mentionnée en la dite déclaration, et qu'un legs (avec condition suspensive) lui donnant le droit de disposer par Testament de la somme en question, ne la constituait pas propriétaire absolu de cette somme.

Judgment rendered the 22nd May, 1855.

In this cause judgment was rendered dismissing, on a *défense au fonds en droit*, the Plaintiff's action, brought for the recovery of £666 13 4. The declaration set forth the rights of the Plaintiff as derived from a clause of the Will of the late Duncan McGillivray, made before witnesses on the 20th of March, 1808, alleged in the declaration, and which is in the following terms :

" I also bequeath to Magdalen McGillivray, my natural
" daughter, now at Quebec, the yearly interest of one thou-
" sand six hundred and sixty-six pounds, thirteen shillings
" and four pence, current money aforesaid, to be paid to her
" yearly and every year, in quarterly payments, during her
" natural life, which said sum of one thousand six hundred
" and sixty-six pounds, thirteen shillings and four pence, I
" will and direct that my said Executors shall place out on
" securities at legal interest, at their discretion, for the benefit
" of the said Magdalen McGillivray, as aforesaid, and after
" the death of the said Magdalen McGillivray, if she shall
" leave alive any children or child lawfully begotten in
" marriage, I then give and bequeath the said one thousand
" six hundred and sixty-six pounds, thirteen shillings and

" four pence, to such child or to such children, to each their
 " just and equal proportion thereof, share and share alike ;
 " but in case the said Magdalen McGillivray shall die leaving
 " alive no children or child lawfully begotten in marriage, I
 " then and on that contingency will and direct, that the sum
 " of one thousand pounds, current money aforesaid, part and
 " parcel of the aforesaid sum of one thousand six hundred
 " and sixty-six pounds, thirteen shillings and four pence,
 " shall belong to and make part of my residuary estate, and
 " shall be, as such, the property of my residuary legatees,
 " hereinafter named, and the remainder of the sum aforesaid
 " of £1666 13 4 shall be by her disposed of by Will, as she
 " may think proper."

The declaration then set forth probate of the Will, on the 27th April, 1808 ;—the marriage of the Plaintiff on the 4th of May, 1818, with Joseph Farnden, since deceased ;—and that the sole issue of the said marriage were Mary Jane Farnden, John George Farnden, and Hunter Richardson Farnden, all living and of full age ;—the appointment of the Defendant on the 24th June, 1848, as curator to the substitution created by the Will ; and his receipt, as curator, of the sum of £1666 13 4 mentioned in the Will ;—the appointment in due form of law of Charles Houghton, as tutor *ad hoc* to John George Farnden, then a minor, for the purpose of assigning to the Plaintiff the rights of the minor in the said sum ;—the transfer to the Plaintiff by Mary Jane and Hunter Richardson Farnden, and of Charles Houghton, as tutor of John George Farnden, before notaries, on the 7th December, 1850, of their rights in the said sum ;—and the ratification of the said transfer on the 14th February, 1854, by John George Farnden, then of age. Then follows an allegation that at the time of the institution of the action the Plaintiff was 55 years of age, and that it was not possible in the course of nature that she should have children.

The *Défense an fonds en droit* was founded on the grounds ; that the Plaintiff had shewn no right to the sum demanded ; that in the event of the Plaintiff dying without leaving at her death any children alive, and without having made any Will disposing of the sum demanded, such sum would become the property of the universal legatees of the testator, who would be entitled to demand the same from the Defendant ; and that the Plaintiff, by the allegations of the declaration, shewed she had no power to dispose of the money otherwise than by Will.

SMITH, Justice, dissenting : I consider that the clause in the Will is to be governed by the law regulating substitutions ; it creates a *fideicommiss* ; the Plaintiff, by the words giving her power to dispose of the money by Will, became absolute proprietor of the same, and the sum sued for would go to her heirs, and is excluded from the *residuum* of the testator's estate.

DAY, Justice : The Court does not look upon the clause of the Will as constituting a bequest which can vest the money absolutely in the Plaintiff. Her interests are considered by the Court as including merely the right, first, to the interest of the money, and, secondly, of disposing of it by Will. This does not include the right to the thing itself during her life. The latter part of the clause does not neutralize the former part which gives her the interest yearly, during her life, of the whole sum. She is a natural daughter, and by the rules of law would have no heirs if she had no children. The demurrer therefore is well founded.

Judgment—

“..... Considering that it appears that the late Duncan “McGillivray, by his last will and testament in the Plain-“tiff's declaration in part recited, gave and devised to the “Plaintiff the interest only of the sum of £1666 13 4, cur-

" rent money of the Province of Canada, to be paid to her
" annually by his trustees therein named, together with the
" right, under certain conditions in the said Will set forth, of
" disposing by Will of the sum of £666 13 4, said current
" money, part of the said sum of £1666 13 4, and that
" under and by virtue of the said Will of the late Duncan
" McGillivray, or by reason of any other matter or thing in
" the said declaration alleged, and by law, the Plaintiff hath
" not become entitled to have, at any time, during her life,
" the said sum of £666 13 4, said current money, maintaining
" the said *Défense au fonds en Droit*, doth dismiss the action
" of the Plaintiff with costs. The Honorable Mr. Justice
" SMITH dissenting from this judgment."

CARTER, EDWARD, for Plaintiff.

BLEAKLEY and MONK, for Defendant.

The following are the observations of Mr. Justice Aylwin upon Judgment being rendered, in the Court of Appeals, in the case of Moffatt *et al.*, and Bouthillier, reported *ante* page 235 :

I dissent from the judgment of the Court in this case, and although in expressing the grounds of my opinion, I might confine myself within strictly technical limits, its importance to the commercial community requires that I should go beyond. First then, as to the form in which the matter in contestation between the parties has been submitted to the Court below and to us. The object which both parties had in view, was to ascertain whether the Respondent, in his official capacity of Collector of Customs at Montreal, was by law bound to exact and receive from the Appellants, as the importers of certain goods and merchandise, in their declaration mentioned, the duty of customs, by law established, "*according to the actual cash value of such goods and merchandise in the principal markets of the country whence they were imported into the Province, at the time the said goods were imported therefrom.*"

The declaration asserts that "the invoice of the said goods exhibiting the actual cost and fair market value thereof, *at the time of purchase, and a declaration and entry in due form of law were presented and given to the said Collector,* and the said Appellants being desirous of warehousing the same, in accordance with the Act herein-after next mentioned, a bond for securing the said duties, in which *the value of the said brandy, at the time of purchase, was adopted and received, and was made and entered into by the said Appellants in due form of law, and delivered to the said Respondent,* under the provisions of an Act of the Legislature of this Province made and passed in the session held in the 10th and 11th years of Her Majesty's Reign, intituled, "An Act for repealing and consolidating the present duties of Customs, &c.," and the said sixty hogsheads

" of brandy were thereupon placed and deposited in a public
" warehouse, at the port of Montreal aforesaid."

" That afterwards, to wit, &c., the Appellants being
" desirous of removing the said goods and brandy, and of
" paying the duty thereon, at the value aforesaid, required
" the said Respondent to receive such *ad valorem* duty and
" to permit the said goods to be removed, yet the said Re-
" spondent, collector as aforesaid, unjustly and unlawfully
" refused to receive the said *ad valorem duty on the value*
" *aforesaid, but informed the said Appellants that the said*
" *goods had been appraised by him for duty at the rate or price*
" *of 160 francs* for each and every hectolitre of the said
" brandy, as the said Respondent *averred and declared the*
" *value thereof at the time when the said goods were exported*
" *from France*, that time being, *as declared by him, the period*
" *at which the value was appraised*, and at which time the
" value of the said brandy was twenty-five francs per hecto-
" litre more than and exceeding the actual and fair market
" value thereof in the principal markets of France, at the
" time of purchase, and the said Respondent unjustly and un-
" lawfully demanded from the said Appellants, duty on the
" amount last aforesaid, to wit, on the value thereof at the
" time of the export. That such appraisement, *even if any*
" *such was made by him*, on the basis and principle aforesaid,
" *was wholly illegal and unwarranted by law.*"

The declaration proceeds to state a protest against the Respondent, followed by a tender of the duties according to the bond, and that the Appellants were compelled, in order to avoid a forfeiture of the said goods, to pay the duty so unjustly demanded by the said Respondent, to wit, amounting to the sum of £50 5 0, over and above the amount of duty which was justly payable in respect thereof, on the value of the said goods, at the time the same were purchased by the said Appellants, which said last mentioned sum they did again object to and protest against paying, but the said Respondent unjustly and unlawfully exacted the same.

The declaration then asserts that a bond was adopted and received by the Respondent, at the hands of the Appellants, in which a certain rate of duties was agreed to between them according to the cost price. It does not admit any appraisement, barely states a pretension by the Respondent, that such was made, and questions the making of it. It seems to me therefore, that it was the duty of the Respondent to have affirmed substantively, by plea, the making of any appraisement, in derogation of the bond accepted by him, and that resort to a general demurrer was dangerous and improper. The grounds assigned in support of the demurrer involve matters of fact on which the parties are not agreed, and particularly the third ground, which the Court below adopted in its judgment in this respect, seems to me singularly faulty, it is thus expressed :

“ Because the Defendant was required by law, to refuse “ the duty tendered to him by the Plaintiffs, unless such “ value was confirmed and established by the appraisement “ of the said goods in virtue of the provisions of the statute “ 16 Victoria, cap. 85, sect. 4, which enacts, &c., and “ the Plaintiffs do not aver that the valuation, as set out in “ their invoice, was so confirmed and established.”

The Appellants admit no appraisement at all, *the appraisement* could not be answered by the Respondent, but was matter of plea and proof for him. When a public officer is charged with extortion over and above the amount of the bond by him accepted as this declaration charges, I would desire a plea of justification, and a substantive issue instead of a demurrer.

I shall now proceed to the examination of the merits of the case, supposing them properly to present themselves for our disposal. Under our Provincial laws of the customs, the invoice is always to be produced, when attainable, and the entry of goods is predicated upon it. In the present instance, the declaration states that the Appellants were the

purchasers in France, and the importers into this country, of the goods in question on their own account, and the cost price of which they distinctly allege, and that after production of the invoice to the collector at Montreal, a declaration and entry in due form of law was presented and given to him, and a bond was by him taken pursuant to the statute of the 10th and 11th of the Queen. The statute of the 12th Victoria, cap. 1, goes the length of prescribing the very forms of the oaths required upon the entry of goods, to meet : 1st. the case of an agent, consignee or importer *not being the owner* ; 2^{dly}. that of an owner whose goods have been purchased ; 3^{rdly}. that of an *owner when the goods have not been actually purchased* ; 4^{thly}. of an owner, consignee, importer or agent, *on entering merchandise without invoice* ; 5^{thly}. of an owner residing out of this Province, *when there is no owner in the Province who can attest the invoice*, or when the owner is the manufacturer, or concerned in the manufacture of the goods. To these forms is subjoined the following legislative declaration : "the wording of any of these oaths or affirmation, may be changed to suit the circumstances of the case, and the oath or affirmation will be sufficient : *provided the requisite facts are distinctly stated and sworn to or affirmed.*

The Appellants, according to their statement, were placed in the second category "owners whose goods have been purchased," and they must have made the following oath or affirmation, before being permitted to make entry ; " I, (name) do so—
 " lemnly and truly swear that the bill of entry now deli—
 " vered by me to the Collector, contains a just and true
 " account of all the goods, wares and merchandise, im—
 " ported by, or consigned to, George Moffatt and Co., in the
 " ship—whereof—is master, from Charente, that the
 " invoice which I now produce contains *a just and faithful*
 " *account of the actual cost* of the said goods, wares and
 " merchandise, that I do not know nor believe in the exis—
 " tence of any invoice or bill of lading other than those

" now produced by me, and that they are in the state in which
 " I actually received them; and I do further solemnly and
 " truly swear, that I have not in the said bill of entry concealed
 " or suppressed any thing, whereby Her Majesty the Queen
 " may be defrauded of any part of the duty lawfully due on
 " the said goods, wares and merchandise, and that if at
 " any time hereafter I discover any error in the said invoice,
 " or in the bill of entry and account now produced, of the
 " said goods, wares and merchandise, or receive any other
 " invoice of the same, I will immediately make the same
 " known to the collector of this port. So help me God."

It is urged by the Respondent, that duties are to be calculated upon the value of the goods in the principal markets of France, at the time of the export. If such were the intention of the Legislature, how could such form as that which precedes, have been prescribed by legislative authority in express terms? The form says not one word of value at all, nor of any time or any place whatever, on the contrary, it attaches itself to the *actual cost*, that is, the sum which the importer paid to obtain the articles, or the *bond fide* invoice price, or cost, I see no repugnancy between the form just given and that which precedes it in the statute book, to meet the category first, of an agent not being the owner, the conclusive and material part of which is as follows : "that the invoice, now produced by me exhibits the *actual cost or fair market cash value* at the time when the same were thence exported to this Province, in the principal markets in (*insert the name of the country whence the goods were exported to this Province, or use such other words as will meet the facts*) of the said goods, wares and merchandise." In this form I view the term "actual cost" as put in contradistinction to "fair market cash value at, &c.," the two things being essentially different and I read the word "or" as giving the agent, &c., the alternative of swearing either to the "cost" or to the "fair market cash value" as he may be advised or feel himself warranted in

doing. I am fortified in the belief that the legislature in settling the *ad valorem* rate of duty, intended to adopt the "actual cost" as the basis, by the form prescribed to meet category No. 3, which requires that the party should distinctly swear: "*that the said goods &c., were not actually bought by me or by my agent in the ordinary mode of bar-gain and sale*, but that, *nevertheless, the invoice which I now produce contains a just and faithful valuation of the same, at their fair, market cash value in the principal markets of the country whence exported, at the time they were so exported.*"

Why negative "the purchase by bargain and sale, in the ordinary mode," and why resort to the "nevertheless," were it not, that the "actual cost" was what the legislature aimed at getting."

The form to meet the fifth category again requires the party to swear "that the same were not *actually purchased* by me *or on my account*" or "that the said invoice contains a just and faithful account of the *actual cost* of the said goods, &c., by a clerical error or a misprint in the 9th line, page 101, of the statute book "and" is put for "or" before the words "of their fair market value in the principal markets of the country whence exported, at the time when the same were purchased for my account." I see in these forms prescribed by the legislature a well marked intention to ascertain the "actual cost," and in the absence of an express enactment that the value in the principal markets, at the time of export, shall be the standard, I cannot adopt it by implication or inference. I am disposed to restrict it to the case when the actual cost cannot be ascertained. It may be said that the revenue is endangered by the literal construction which I put upon the forms, even should such be the case, I would not feel myself justified in straining after another construction by fiscal considerations. But the danger is only imaginary, with the power given to the collector under

the 18th and 19th sections of the statute of 1849, and the right of taking payment of the duties in kind at the invoice price. The invoice so far from being conclusive on the Crown, binds only the importer, and sound policy as well as old commercial usage seek for the production of the invoice, as the law holds the party rendering it liable to all the consequences of a false statement and of misrepresentation. It is no proof in his favor, but strong evidence against him if impeached of fraud.

If I could enter upon the question of appraisement at all, I should say that under the 14th section of the statute of 1849, which enacts that "*the appraisement which the appraiser or collector acting as such shall make thereof, shall be final and conclusive,*" it was the duty of the Respondent to plead and prove such appraisement, and this being done, all controversy before the ordinary tribunals would have been at an end. The value of the goods in the principal markets of the country whence they have been exported, at the time of export, is not easily to be ascertained in the law Courts, and the cost of the operation must be ruinous. The subject more properly falls within the jurisdiction of an appraiser, and I am impressed with the belief that the legislature by this 14th section intended to put an end to litigation, outside of the purlieus of the Custom House itself, I see nothing to warrant the pretensions of the Respondent to charge a higher rate of duty on the contingency of a rise in the value of imported goods, between the time of purchase and that of export. Under the 26th section of the statute of 1847, by which it is provided "that all goods taken out of warehouse, at any "time hereafter, shall be subject to the duty to which they "should be liable if then imported into this Province, and "not to any other," another and a different question might arise. But this is not the question before the Court. I am of opinion then that in the absence of any cause to disturb the adjustment of duties made by the bond given by the Appellants to the Respondent, it should subsist, and that

the Appellants are entitled to recover back the excess paid by them, unless the Respondent can specially justify his claim to it on behalf of the Crown upon some other ground than that on which he has relied.

VICE ADMIRALTY COURT.—LOWER CANADA.

Before The Hon. H. BLACK, Judge, Vice Admiralty Court.

THE VARUNA.—*Davis.*

Held:—That seamen brought to Quebec under articles of agreement in which the engagement is expressed thus:—“The several persons whose names are hereto subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports and places in the Mediterranean and Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months,” are entitled to, and can sue for their wages in Quebec, and cannot be compelled to return in the ship to a final port of discharge in the United Kingdom.

Jugé:—Que des marins amenés à Québec en vertu d'un contrat dans lequel l'engagement est ainsi exprimé: “Les personnes dont les noms sont respectivement souscrits aux présentes, s'engagent de servir à bord du dit vaisseau sur les capacités apposées vis-à-vis leurs noms respectivement, dans un voyage du port de Liverpool à Constantinople, de là (s'il est nécessaire) à aucun port ou place dans la Méditerranée ou la Mer Noire, ou dans aucun autre endroit où l'on pourra se procurer du fret, avec la faculté d'entrer dans un port pour y prendre des ordres, et jusqu'au retour final du vaisseau dans un port du Royaume-Uni pour y décharger, ou pour un terme qui n'excède pas douze mois.” ont droit et peuvent poursuivre pour leur gages à Québec, et ne peuvent être contraints de rester à bord jusqu'au retour du vaisseau dans un port du Royaume-Uni pour y décharger.

— Judgment rendered the 12th October 1855.

These were three actions for which a reference from two Magistrates had been obtained, and brought into this Court by Michael Murphy and two others, for the recovery of their wages for services performed as seamen on board of the vessel called the “Varuna,” whereof John Davis was Master, on a voyage from Liverpool to Constantinople, thence to Malta, and thence to Quebec.

The Proctor for the Master by protest propounded, that the seamen had entered into written agreement with him, the Master, in Liverpool, in England, on the 29th day of

March last past, whereby they bound themselves and agreed to serve on board of the said vessel the "Varuna," on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports and places in the Mediterranean and Black seas, or wherever freight might offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months, and that therefore this Court had no jurisdiction, inasmuch as the seamen were bound by this agreement to return in the ship to a final port of discharge in the United Kingdom. The Proctor for the Master referred to the 94th section of the Mercantile Marine Act 1850, in support of this point, which act he said regulated the term of the contract or agreement in this case, inasmuch as the articles were signed on the 29th March last, before the Merchant Shipping Act now in force came into operation ; although the latter act contained a clause of the same character. The section of the act of 1850 in question, enacts, that, " No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue abroad for wages in any court, or before any justice, unless he be discharged in the manner required by the General Seaman's Act, and with the written consent of the Master, or proves such ill-usage on the part of the Master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman by remaining on board ; but if any seaman on his return to the United Kingdom proves that the Master or owner has been guilty of any conduct or default which, but for this enactment would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover, in addition to his wages, such compensation, not exceeding twenty pounds, as the Court of Justice hearing the case may think reasonable." This clause, it was contended for the master, took away all jurisdiction from the Court inasmuch as the engagement in this case was one which was to terminate in the United Kingdom. It

was therefore contended for the Master that the seamen must be held and be bound to return in the vessel to a final port of discharge in the United Kingdom; according to agreement.

It was maintained by the Proctor for the seamen that they were entitled to their wages here in Quebec, and were not bound to return home in the ship, inasmuch as they were merely bound to go to any port or ports in the Mediterranean or Black Seas, and back to a final port of discharge in the United Kingdom, and that the Master having brought the men out to Quebec had broken the agreement, and that it was no longer binding upon the men, and referred to some cases which he alleged were precisely similar to the present one, in which the Court had decided that the men were entitled to their wages.

Hon. HENRY BLACK : Three suits for wages having been instituted by seamen against the ship *Varuna*, before two Justices of the Peace for the District of Quebec, the cases have been by the Justices referred to be adjudged by this Court. These cases turn purely upon the question whether the men are, under the 94th section of "The Mercantile Marine Act, 1850," or the 190th section of "The Merchant Shipping Act 1854," entitled to sue for their wages on the ground that the voyage for which they engaged, and their engagement, have been terminated by the ship's having, as they allege, abandoned the voyage mentioned in the articles of agreement, and commenced another voyage for which they had not agreed. The articles are dated the 29th of March, 1855, and the part material to the present case is in the following words :—"The several persons whose names are hereto subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her re-

turn to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months." The ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of discharge in the United Kingdom, she came direct to Quebec, in search of freight; which she had failed to obtain at the ports at which she had previously been.

The 94th section of the Mercantile Marine Act, 1850, is in the following words :—" No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue abroad for wages in any court, or before any Justice, unless he be discharged in the manner required by the General Seamen's Act, and with the written consent of the master, or proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman, by remaining on board; but if any seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which, but for this enactment, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover, in addition to his wages, such compensation, not exceeding twenty pounds, as the court of justice hearing the case, may think reasonable." This provision is also repeated in the Merchant Shipping Act, 1854, which came into operation on the first of May last. The contract being dated before that day, must, I think, be considered with reference to the former, though it would, in law, make no difference, as the words of the two acts are the same. (1)

If the ship's coming to Quebec can, under the act, be considered as a prosecution of the voyage under which these men shipped, then they are not entitled to sue here, and the case must be dismissed. If on the contrary, the ship's

(1) 13th and 14th Vict. Cap. 93.

coming to Quebec cannot be held to be a prosecution of such voyage, then the voyage for which they engaged is at an end by the act of the master or owners, and they must recover.

The language used by the legislature with regard to the description of the voyage, which must be inserted in the shipping articles, has been altered several times in the successive acts ; but the words of the Mercantile Marine Act, 1850, which was in force when the contract was entered into, are, that the articles shall mention, " the nature, and as far as practicable, the length of the voyage or engagement on which the ship is employed." The law which came in force on the first of May last, (1) but which does not however legally apply to these cases, is nearly the same. It requires that the agreement shall contain : " the nature and as far as practicable, the duration of the intended voyage or engagement." A voyage is a technical phrase, and imports a definite commencement, and end. In the present case the commencement was Liverpool, and the end a final port of discharge in the United Kingdom. But the act also requires that the nature of the voyage be stated, and in compliance with this requirement it is described in the articles as to Constantinople, thence, if required, to any ports and places in the Mediterranean or Black Seas, or wherever freight might offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom : and as the act also requires that, as far as practicable, the length of the voyage or engagement on which the ship is to be employed should be mentioned, the articles state a term not to exceed twelve months. The nature of a voyage undoubtedly consists in the place or places to which it is intended to be made ; and the instrument in the present instance must be construed with reference to the description of the voyage given in it, as well

(1) 17th and 18th Vict. Cap. 104.

as to the term of twelve months to which that voyage is to be limited. This term must be construed as a further limitation to the description of the voyage, and not as an alternative substituted for the previous description of its nature, authorising a voyage to any part of the globe to and from which the ship could go and return in twelve months. To construe it as such alternative would be to nullify the previous description of the nature of the voyage ; which the act requires as well as its probable length, shewing clearly the intention of the legislature that the nature of the voyage was a thing perfectly distinct from its mere length, and that both length and nature were of the essence of the contract, and must be stated. Now, I cannot think that a voyage to Quebec, through the gulf of St. Lawrence in the north western parts of the Atlantic Ocean, can be considered to be part of a voyage to a port or ports in the Mediterranean or Black Sea, in the south eastern parts of another quarter of the globe.

The words "or wherever freight may offer," are to be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas named in the articles, or some place in their immediate neighbourhood, or between them and the United Kingdom. Lord *Stowell's* expressions, in commenting upon the application of the words "or elsewhere" in a parallel case, are remarkably apposite. He observes that they are not to be taken in that indefinite latitude in which they are expressed ; they are no description of a voyage ; they are an unlimited description of the navigable globe ; and are not to be admitted as a universal alibi for the whole world, including the most remote, and even pestilential shores, indefinite otherwise both in space and time ; they must receive a reasonable construction, which must be, to a certain extent, conformable to the necessities of commerce. The word "elsewhere" must, in its construction, vary much, according to the situation of the primary

port of destination ; if it is applied to a country remote from all neighbouring settlements, it is entitled to a larger construction—if to one that is surrounded by many adjacent ports, the limitation would be much narrowed, and I cannot help observing here, that the captain has deprived himself of an extensive latitude, by describing the primary port to be in the neighbourhood of many adjacent ports, which could supply cargoes (1). It appears to me that no reasoning can be more conclusive than this; and thinking, as I do, that the voyage of the *Varuna* to Quebec, is one which cannot come within the description of the intended voyage for which the men agreed, but is a departure from that voyage, and the substitution of a new and perfectly different one, by which departure and substitution the contract between them and the Master is terminated, I am of opinion that the men are entitled to recover their wages at this port, and I accordingly over-rule the protest of the Master by which their right so to recover has been contested.

ALLEYN, for Seamen.

POPE, for Ship.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief Justice, MORIN and BADGELEY, Justices.

No. 2075. { THE BANK OF UPPER-CANADA,..... Plaintiff.
vs.
ALAIN et al,..... Defendants.

Held:—That an affidavit for a writ of capias ad respondentum, made by the Book-keeper of a branch of the Bank of Upper-Canada, is sufficient.

Jugé :—Qu'un affidavit pour un writ de capias ad respondentum, fait par le teneur du livre d'une succursale de la Banque du Haut-Canada, est suffisant.

Judgment rendered the 19th September, 1855.

The cause was heard upon a rule to quash the writ of capias issued against the body of Alfred Morel, one of the Defendants, upon the following, among other grounds :—

That the affidavit, upon which the writ of capias issued,

(1) *The Minerva*, 1 Hagg. 361.

was not made by the Bank of Upper-Canada, or the Book-keeper, clerk, or legal attorney of such Bank, but by the Book-keeper of an alleged Branch of the said Bank of Upper-Canada, and not by the Book-keeper of the Bank itself.

That as the alleged indorser of the promissory note mentioned in the said affidavit, the said Alfred Morel could only be made answerable for the sum of money in the said note specified, upon its being shewn that the said note had been duly presented at maturity to the maker thereof, and that upon the default of the latter to pay the amount, the note had been duly protested as by law required ; and that notice of such default and non payment and protest, had been duly given to the said indorser.

The only ground upon which the Court remarked was the first, and it was observed that affidavits, on the part of cashiers of Banks had been held good and sufficient in the district of Montreal ; and that the distinction between the Book-keeper of a Branch of the Bank, and the Book-keeper of the Bank itself, was one which the Court could not recognise ; and that the motion to quash the writ of capias must therefore be dismissed.

JUDGMENT :—“ The Court, &c., upon the motion of the 3rd March last, pursuant to notice in this cause made and filed by Alfred Morel, one of the Defendants in this cause, that the writ of capias ad respondentum in this cause issued, returned and of record, be quashed and set aside with costs, and the recognizance of the said Alfred Morel cancelled and held for naught, and the said Alfred Morel permitted to enter a common appearance, for the reasons mentioned and set forth in the said rule ;—considering that the grounds set forth in support of the said motion, are insufficient in law, the said motion is hereby overruled with costs.”

Ross, Sol. General, for Plaintiffs,
Jones, for Morel.

SUPERIOR COURT.—MONTREAL.

Before SMITH, VANFELSON and MONDELET, Justices.

Ex parte.

No. 1228. { *JOSEPH, Petitioner for Ratification of Title,*
and
LESLIE,..... Opposant,
and
AULDJO, et al..... Intervening parties.

Held:—That the express authorisation of the husband to his wife, *séparée de biens*, to become bound as his surety, is sufficiently proved by a notarial deed signed by them, in the beginning of which par eux, au commencement duquel la wife appears, with other creditors of her husband, and is declared to be "au-
*torisée en justice, and otherwise the-
" robe specially authorized by her hus-
" band, testified by his signature thereto"* as party of the *first part*, and also appears, with another, as surety for her husband, and as a party of the *fourth part*, although no words of authorization are contained in that part of the deed where they appear, or where she binds herself as such surety.

Jugé:—Que l'autorisation expresse du mari à sa femme, séparée de biens, pour s'engager comme sa caution, est suffisamment prouvée par un acte notarié signé par eux, au commencement duquel la femme compareignant avec autres créanciers de son mari, est déclarée être " autorisée en justice et en autre spécialement autorisée, au dit acte par son mari, partie au dit acte et signataire d'icelui," comme partie d'une autre, avec un autre comme caution de son mari, et comme partie en quatrième lieu, quoique cette partie de l'acte où ils comparaissent, et où la femme s'oblige comme caution de son mari, ne contienne aucune autorisation spéciale.

Judgment rendered the 22d May, 1855.

The Petitioner prayed for ratification of a notarial deed of sale made to him on the 11th November, 1853, by Louis Auldjo and others, as the sole heirs and heiresses at law and devisees of their mother, the late Helen Richardson, formerly of Montreal, wife of the late George Auldjo, in his lifetime of the same place, merchant; the said late Helen Richardson having been duly and legally separated from her said husband as to property, as well by marriage contract made and executed at Montreal, on the 4th day of October, 1816, as by judgment of the Court of King's Bench for the District of Montreal, duly executed.

The Opposant, Leslie, filed an Opposition founded on a notarial agreement of the 9th day of May, 1836, registered on the 3rd of September, 1843, copied at full length

in the Opposition. The agreement purports to be executed between various parties, creditors of the late firm of Maitland, Garden and Auldjo, amongst others : "Helen Ri-
 " chardson, of the City of Montreal, *autorisée en justice*,
 " and otherwise thereby specially authorized by her hus-
 " band, George Auldjo, Esquire, testified by his signature
 " thereto, the said Helen Richardson, acting as one of the
 " heiresses at law of the late Honorable John Richardson,
 " and as assignee and purchaser of the debts of William
 " Christie (and various others named) *of the first part*,
 " James Leslie, of the said City of Montreal, merchant,
 " *of the second part*; the said George Auldjo, of Montreal,
 " *of the third part*, and Thomas Brown Anderson,
 " and Helen Auldjo, *of the fourth part.*" This agree-
 ment sets up in effect the dissolution of Maitland, Gar-
 den and Auldjo, on the 18th of April, 1826, by reason of
 insolvency; an assignment of the 19th of July, 1826, by the
 late firm with the consent of the parties of the first part, of
 all the property of the firm to James Leslie, Horatio Gates
 and James Fleming, and the survivor and survivors of them,
 as trustees, for the benefit of the creditors,—the death of
 Gates and Fleming;—agreement of the 23d of October,
 1834, between George Auldjo and various creditors having
 claims against the firm to the extent of £26,220 8 0, that
 Leslie, as surviving trustee, should make over and relinquish
 to Auldjo the remainder of the estate. The rendering of
 an account by Leslie, whereby it appeared that £70,087 8 4
 had been received, and £68,598 7 8 paid by the trustees,
 leaving a balance of £1509 0 8, then in the hands of Auldjo,
 of the remainder of the Trust Estate, Auldjo binding himself
 to indemnify Leslie against all claims of the representatives
 of his late copartners, or of the creditors of the firm, and
 from and by reason of all the acts of Leslie or his co-trustees
 in the gestion of the estate, and from all the acts which
 Auldjo, as attorney of James Leslie, might hereafter per-
 form under the power of attorney referred to.

Here follows the clause : " And the said Helen Auldjo, " did and doth hereby covenant, promise and agree to and " with the said James Leslie, and doth bind and oblige her- " self, her heirs, executors and curators unto the said " James Leslie, his heirs, executors and curators as surety " for him the said George Auldjo, and for the true and faith- " ful performance by him the said George Auldjo, of all, " each and every the covenants, by him the said George " Auldjo, to and in favor of him the said James Leslie, herein- " before contained, hereby renouncing the benefit and ad- " vantage of division, discussion and fidejussion." Then follows a similar undertaking by Thomas Brown Anderson, as surety with the said Helen Auldjo, and a full ratification of the transfer, and a release and acquittance to Leslie from the various creditors. The Opposition then alleges that, at the date of the agreement, Helen Richardson was proprietor of the property mentioned in the deed of sale to the Petitioner.

Conclusion : That " no Judgment of Ratification be ren- " dered unless the property be declared hypothecated, in " favor of the Opposant, to the obligations in the said deed " stipulated by the said late George Auldjo, in favor of the " said Opposant, for which obligation the said Helen Ri- " chardson became the said security, to wit : that the " said George Auldjo, his heirs, executors and curators, shall " and will from time to time, and at all times hereafter, effec- " tually indemnify and save harmless the said Opposant " from, &c. "

The vendors, Louis Auldjo *et al.*, intervened, and by *Défense en droit* and *Exception* contested the Opposition of Leslie, on the ground chiefly that the undertaking of Helen Auldjo, as surety, was null and void for want of express authorization, without which she could not legally contract or create any hypothec on her property.

Issue being joined, admissions were given of the death of George Auldjo ;—that Helen Auldjo and Helen Richardson, were not different persons ;—and that she was in possession

of the property in question at the date of the agreement of May, 1836, and the parties were heard by consent on all the issues raised.

SMITH, Justice, dissenting : I consider there was no sufficient authority to enable Mrs. Auldjo to become surety for her husband ; the authority given to her, unnecessarily, in her quality of creditor, and *femme séparée de biens* in the first part of the deed, can not be transferred to another part of the deed wherein she appears in another quality, and where her acts tended to the alienation of her property. The authorization all admit must be express ; the presence of the husband would not suffice, and looking at the reason as well as the letter of the rule of law, I can see no such express authorization in the deed submitted.

VANFELSON, Justice : The authorization must be express ; but I think the authority is, in this case, express, and that it extends to the whole deed. The law does not prescribe the form or place of authorization ; and looking at the main end and object of the deed which was to free Mr. Leslie from liability, and to vest the remainder of the partnership estate in George Auldjo, on security being given, I cannot but consider the authority as sufficiently express and formal. It is admitted to be so in the first part of the deed ; and there no authorization was necessary to the wife as creditor, separated as to property from her husband, and the question is whether this authorization applied to the other part of the deed. Would it not, in case of doubt, be more reasonable to consider the authorization as applicable to that portion of the deed where it is indispensable in order to the validity of the *Acte*, and to give effect and full force to the end all parties had in view, than to restrict it arbitrarily to the clause where it is totally useless, and thereby render the main object of the *Acte* void.

MONDELET, Justice : The *Acte* has different parts, but it is only one *Acte*. The *Acte* is signed by the parties ; how can they restrict the authorization to only one part of it ?

JUDGMENT : " Considering the several Interests of the respective parties to the said agreement of the said tenth day of May one thousand eight hundred and thirty six, and that the principal object the said parties had in view, in entering into and executing the said agreement, was to release the said James Leslie from the several obligations and liabilities to which he was held and bound, at and before the execution of the said agreement, and to invest the said George Auldjo with the same ; considering further that in and by the said agreement, the said Helen Richardson, wife of the said George Auldjo, being thereto specially authorized, as by law required, did become one of the sureties of the said George Auldjo, her husband, for the true and faithful performance of the undertaking of him the said George Auldjo to and in favor of the said James Leslie is good and valid in Law ; and considering, lastly, that from the nature of the agreement entered into by the said parties, the only object for which the said Helen Richardson, by Law, required a special power and authority from her said husband to become legally party thereto, was in relation to such security, to enable him the said George Auldjo to receive the assets of the late Bankrupt Estate of Maitland Garden and Auldjo thus in the hands of the said James Leslie ; and that the said Helen Richardson was formally authorized to that effect, in and by the said agreement ; doth dismiss the *Défense au fonds en Droit* and *Exceptions Peremptoires* of the said Louis Auldjo, and others, Intervening parties in this cause, as unfounded in Law, with costs against the said Louis Auldjo and the Intervening parties. "

DAVID and RAMSAY, for Petitioner.

CHERRIER, DORION and DORION, for Opposant.

CARTIER and BERTHELOT, for Intervening parties.

COUR SUPERIEURE,—MONTREAL.

Presents ; DAY, VANFELSON et C. MONDELET, Juges.

No. 942. { MOREAU..... *Demanderesse,*
 MATHEWS..... *vs.* *Défendeur,*
 FISHER..... *et* *Intervenant.*

Jugé :—Que la stipulation dans un contrat de mariage que "les futurs époux se prennent avec leurs biens et droits à chacun d'eux appartenants, et tels qu'ils pourront leur échoir ci-après, à quelque titre que ce soit, lequel dits biens meubles ou immeubles entreront dans la dite communauté" est un ameublement général de tous les biens des conjoints, nonobstant clause de réalisation subséquente; et que le douaire coutumier ne peut conséquemment être réclamé sur les propres du mari.

Held :—That a covenant in a marriage contract that "the parties take one another with the property and rights to each of them respectively belonging, and such as may thereafter accrue, of what nature soever, which said property moveable or immovable shall enter into the community" is a covenant of *ameublement* of all the property belonging to the parties, notwithstanding a subsequent clause of *réalisation*; and that consequently the customary dower cannot be claimed out of the husband's *propres*.

Jugement rendu le 30 Décembre 1854.

L'action était portée devant la Cour Supérieure, à Montréal, par la Demanderesse, comme cessionnaire et étant aux droits d'Amable Ursule et Henriette Martineau, enfants de Amable Martineau et d'Ursule Lemieux, contre le Défendeur, en revendication de moitié d'un immeuble dont ce dernier était détenteur, que la Demanderesse déclarait affecté au douaire coutumier en faveur de la dite Ursule Lemieux, et ses enfans, suivant les conventions de mariage entre le dit Amable Martineau et la dite Ursule Lemieux, suivant acte devant Delisle, et confrère, Notaires, en date du 1^{er} février 1801; la stipulation est dans les termes suivants :

" Le dit futur époux a doué et doue la dite future épouse du douaire coutumier, ou de la somme de quinze cents livres, ou chelins de vingt coppres, de douaire préfix une fois payé, sans retour, à prendre sur tous et chacuns les biens meubles et immeubles, présents et à venir du dit futur

“ époux, qu'il en a dès à présent chargés, affectés, obligés et
“ hypothéqués à garantir et faire valoir le dit douaire ; ”

John Fisher, l'auteur du Défendeur, intervint et prenant le fait et cause de ce dernier, plaida par une première exception, que par le contrat de mariage en question, il fut, entre autres choses, stipulé et convenu entre le dit Amable Martineau et Ursule Lemieux, qu'ils seraient communs en tous biens meubles et conquets immeubles, et que dans cette communauté de biens, entreraient, ainsi que permis sous la coutume de Paris, tous leurs biens, terres et héritages, meubles et mobilier, présens et futurs, meubles et immeubles ; qu'en vertu de cette stipulation, la totalité des biens possédés par le dit Amable Martineau au temps de son mariage et du dit contrat, y compris l'immeuble décrit en la déclaration de la Demanderesse, devinrent et furent ameublés, et formèrent partie de la communauté de biens qui dès lors exista entr'eux, et que l'immeuble, sur lequel la Demanderesse réclamait le douaire, ayant été aliéné pendant la communauté, ne pouvait, en tant que le Défendeur y était concerné, être grevé du dit douaire coutumier en faveur de la dite Ursule Lemieux, ou de ses enfans, non plus qu'en faveur de la Demanderesse. Par une seconde exception, Fisher opposait que le terrain, que la Demanderesse alléguait être grevé du douaire coutumier, avait été échangé franchement et sans fraude par le dit Amable Martineau, et sa femme, pour un terrain de plus grande valeur.

Par une troisième exception, Fisher plaidait que cet échange, ayant été fait avec garantie de tous troubles et empêchemens quelconques, par le dit Amable Martineau, et Ursule Lemieux, l'option donnée à cette dernière, ou aux enfans s'était trouvée anéantie et éteinte quant au terrain en question.

La quatrième exception, mettait en fait que les enfans douairiers représentés par la Demanderesse avaient reçu, en avancement d'hoirie, des sommes considérables dont ils ne

s'étaient pas dénantis, et avaient à diverses époques fait acte d'héritiers.

Une cinquième exception, énonçait qu'outre l'immeuble acquis en échange par le dit Amable Martineau, et qui était devenu sujet au douaire (s'il avait jamais existé), le dit Amable Martineau au jour du dit échange était propriétaire d'un autre héritage en la Paroisse St. Roch, et qui devait être assujetti au dit douaire, à l'exclusion de toute demande pour tel douaire sur l'immeuble possédé par le dit Défendeur.

Dans une sixième exception, Fisher alléguait que dans et par le contrat en question, il fut convenu que les biens meubles et immeubles, présens et à venir de chacun des conjoints, entreraient dans la communauté de biens stipulée au dit contrat et en formeraient partie ; que l'immeuble, sur partie duquel on réclamait le douaire était devenu ainsi ameublé, et dès ce moment le dit Amable Martineau en avait eu l'entièvre disposition, comme des autres biens de la communauté, et cet immeuble devint passible aux dettes et obligations que pourrait contracter la dite communauté ; que subséquemment, avant qu'il fût né aucun enfant de ce mariage, Martineau et sa femme échangèrent avec promesse solidaire de garantie de tous troubles et empêchemens quelconques, le dit immeuble avec le nommé Leduc et cessèrent alors d'en être propriétaires, et leur communauté cessa également d'en être propriétaire, et en outre devint obligée à en assurer la possession au dit Leduc, et ses ayant cause ; que cette propriété depuis lors, subit plusieurs aliénations que lui, Fisher, l'acquit du Shérif sur décret et avait droit de la vendre, et que le Défendeur l'ayant acquise de lui, la possérait à juste titre, dûlement inscrit et en force au temps de l'institution de l'action ; que Martineau à son décès ne la possédait plus ; que ses enfans ayant renoncé à sa succession, ainsi qu'à celle de leur mère, avaient par là renoncé à tous droits qu'ils pouvaient avoir sur le dit immeuble, qui était grevé des dettes et obligations de la communauté, et

devait en être considéré encore comme grevé ; que parmi ces dettes et obligations, se trouvait l'obligation de garantir Leduc et ses ayant cause tel que sus expliqué ; qu'en conséquence le dit immeuble, ne pouvait être distrait de la dite communauté, et l'ameublement n'en pouvait être mis de côté au détriment du dit Fisher et du Défendeur.

Par une huitième exception, Fisher plaiderait que le transport fait à la Demanderesse, était une cession de droits litigieux, faite sans aucune valeur ou considération, et sur laquelle la Demanderesse ne devait rien obtenir du Défendeur. A la première de ces exceptions, la Demanderesse répondit que l'immeuble en question n'avait pas été ameublé par le susdit contrat de mariage ; que les futurs n'avaient jamais eu cette intention, nonobstant la clause troisième invoquée par l'Intervenant, mais avaient entendu se soumettre au régime de la communauté légale telle qu'établie par la coutume de Paris, vu qu'il est stipulé dans ce contrat : 1o. Communauté suivant la coutume ; 2o. Séparation des dettes, douaire préfix ou coutumier au choix de la future épouse ; 3o. Un préciput ; 4o. Reprise par la future de son apport au cas de renonciation ; 5o. Le remplacement des propres des conjoints aliénés pendant le mariage. Que l'intention des parties avait été d'ameublir que les conquets et les fruits de leurs propres, et que leurs propres n'entreraient dans la communauté que pour les fruits seulement.

A la seconde exception, la Demanderesse répondit, que longtemps avant son décès, Amable Martineau, s'était dénanti et dépossédé de l'immeuble qu'il avait eu en contr'échange de celui sur lequel le douaire était maintenant réclamé.

La réponse aux autres exceptions était générale.

VANFELSON, Juge :—L'action est réelle aux fins d'obtenir un douaire coutumier dû aux enfans d'Amable Martineau, dont la Demanderesse est cessionnaire.

La présente demande procède d'une stipulation entre ce nommé Amable Martineau, et Ursule Lemieux, contenue en

leur contrat de mariage endate du 1er février 1801, devant Delisle, et confrère, notaires, dans lequel on trouve entr'autres conventions ordinaires sur tel contrat, les suivantes, savoir :

- 1^o Communauté de biens suivant la coutume de Paris.
- 2^o Douaire coutumier, ou douaire préfix de 1500 livres.
- 3^o Préciput, chambre garnie.
- 4^o Exclusion des dettes respectives des futurs conjoints.
- 5^o Remploi des propres aliénés.

La troisième clause du contrat, cause de la difficulté ici, est énoncée en ces termes :

“ Se prennent les dits futurs époux avec leurs biens et
“ droits à chacun d'eux appartenant, et tels qu'ils pourront
“ leur écheoir ci-après, à quelques titres que ce soit, les
“ quels dits biens meubles et immeubles, entreront dans la
“ dite communauté. ”

Il est à propos d'observer ici que les mots usités “ ameublement ” et “ propres ” sont omis, et que cette clause n'est pas libellée dans les termes généralement employés (1).

Le Défendeur et l'Intervenant soutiennent que cette clause contient un *ameublement* absolu et qui fait tomber dans la communauté tout ce que les parties contractantes avaient alors, et conséquemment exclu toute demande de douaire coutumier. Si cette prétention peut être soutenue, je suis prêt à admettre que s'il y a ameublement, il n'y a pas lieu au douaire, et que cette action doit être renvoyée ; mais si, au contraire, on doit adopter l'interprétation donnée au contrat par la Demanderesse, et si les différentes clauses de l'acte peuvent avoir effet et s'harmoniser entr'elles, comme le prétend la Demanderesse ; cette dernière doit avoir gain de cause.

Pour bien juger des droits respectifs des parties sous l'opération de ce contrat, il nous faut considérer attentivement et

(1) Ferrière—Edit. 1771, liv. 4. ch. 22 p. 344 “Les Formes”

examiner toutes les stipulations dans leur ensemble, et par là s'assurer de l'intention des parties.

Arnable Martineau, le futur, était veuf de Marie Josephte Leduc sa première femme ; un contrat de mariage avait été fait entre eux, dans lequel il avait été expressément stipulé que tous leurs biens, y compris les immeubles, étaient *ameublis pour entrer en communauté* ; ils étaient alors propriétaires d'héritages dont partie fait l'objet du présent procès. Par la clause d'ameublissement ces biens sont devenus, après la dissolution de communauté, *acquets* dans la personne de Martineau le survivant. Telle étant la situation des affaires de Martineau, lors de son convol en secondes noces avec Ursule Lemieux, il est facile, dans mon opinion, de donner une interprétation rationnelle, et un sens légal aux différentes clauses qui ne forment toutes ensembles qu'un seul contrat ; et voyons si elles peuvent raisonnablement et convenablement sortir leur effet, et si elles le peuvent, l'intention des parties sera claire, évidente et hors de doute.

Examinons l'acte clause par clause et qu'y trouvons nous ?

Une communauté de biens suivant la coutume de Paris. C'est là le droit commun du Bas-Canada, et cette clause n'est pas susceptible de deux interprétations.

Vient ensuite la clause par laquelle il est stipulé que les futurs époux ne seront point tenus des dettes antérieures au mariage. Cette clause est généralement insérée dans les contrats de mariage, et déroge à l'article 221 de la coutume. Les termes sont trop clairs pour avoir besoin d'interprétation.

Suit la clause 3e, cause de la difficulté, citée plus haut. Le Défendeur et l'Intervenant y trouvent un *ameublissement formel*. S'il en est ainsi, avec quels biens chacun des futurs paiera-t-il les dettes par lui contractées avant le mariage ? S'il en est ainsi que devient la communauté légale stipulée dans la première clause sous la sanction du droit

commun ? Que devient le douaire coutumier stipulé par la 4^e clause qui suit immédiatement ce prétendu ameublement ? A quoi bon la septième clause où l'on stipule formellement la manière dont les deniers provenant de l'aliénation des *propres* seront employés ? Si la totalité des *propres* est ameublie, le mari étant par la loi, *seigneur et maître de la communauté*, peut en disposer comme bon lui semble, (sans fraude s'entend), et dans ce cas que devient cette septième clause ? Si les parties avaient en vue un *ameublement*, pourquoi n'avoir pas employé la formule suivie et approuvée ? Pourquoi omettre le mot usité, *ameublement* ? Pourquoi n'y pas insérer le mot essentiel de "propres," les biens mêmes sur lesquels était créé le douaire ? En accueillant la prétention du Défendeur et de l'Intervenant, toutes ces conventions agréées entre les parties se trouvent absolument détruites et mises au néant, et cela pour donner effet à une prétendue clause d'*ameublement* qui n'a jamais été dans l'intention des parties, d'après l'ensemble du contrat. De l'autre côté en adoptant l'interprétation que la Demanderesse donne à ce contrat, chacune des clauses de cet acte concorde et s'harmonise avec les autres. Je n'hésite aucunement à dire que, dans mon opinion, dans l'espèce présente, il n'y a pas ameublement ; mais en supposant qu'il y eût doute à ce sujet, il y a des règles de droit positives, qui doivent nous régir dans ce cas, et qui sont conclusives ; ces règles veulent que dans le cas où une clause est obscure et paraît en contradiction avec une autre qui l'accompagne, il faut interpréter l'une par l'autre de manière à les laisser subsister toutes deux, et leur donner effet, et au soutien je cite les autorités qui suivent.

"Toutes les clauses des conventions s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier." (1)

(1) 6. Toullier, No. 318 :—Domat, *Lois Civiles*, liv. 1, tit. 1, sect. 2, Des Conventions en général, p. 10 :—1 Bourjon, *Communauté*, 2 partie, sec. 1, p. 524 :—Nouv. Denisart, *Ameublement*, § 6, p. 525.

“ Les ameublissemens demandent à être clairement exprimés, lorsque, d'après les termes du contrat, il y a lieu de douter si les parties ont eu intention d'en former un, l'on préfère en général l'interprétation qui tend à l'écartier ” (1).

En dernier lieu je vois une cause récente qu'on trouve dans les rapports du Bas-Canada (2) qu'on citera peut-être ici ; mais elle n'a aucune application au cas actuel ; les deux parties y admettaient pleinement que le contrat contenait une clause formelle d'ameublissement, et la seule question soulevée par les parties était de savoir si cette clause excluait le douaire coutumier ou non. La cour décida dans l'affirmative, et je concours volontiers dans cette opinion.

Sur le tout, je suis enclin à conclure qu'il n'y a pas d'ameublissement dans le contrat de mariage sous considération ; que le douaire en question est dû, et que la Demanderesse doit avoir jugement en sa faveur.

En adoptant cette opinion, je n'ai pas manqué d'examiner les différents moyens de défense proposés à l'encontre de la demande, mais je n'en trouve aucun de fondé en droit ou légalement prouvé.

Pour toutes ces raisons, je ne concours pas dans le jugement qui va être rendu.

DAY, Juge :—Ce n'est que sur une forte conviction que je me suis déterminé à adopter une opinion contraire à celle de mon savant frère, dont la longue expérience et l'habitude de ces matières m'auraient autrement entraîné à concourir avec lui.

A la demande en cette cause pour douaire, le Désendeur n'a pas plaidé, mais Fisher, son garant, a plaidé ameublement de l'immeuble en question, par le contrat de mariage même où ce douaire était stipulé, et conséquemment que ce douaire ne pouvait être pris et recouvré sur cet immeuble,

(1) Troplong, Contrat de Mariage No. 1986, p. 501.

(2) 1. Déci. Bas-Canada, p. 25, Toussaint et al vs, Leblanc.

qui avait été aliéné par les époux pendant le mariage. La Demanderesse a répondu à cette exception que la clause invoquée par Fisher n'était pas une convention d'ameublissement de propres, et n'avait pas d'autre effet que de faire tomber les acquets, et les fruits des propres, dans la communauté. L'honorable juge Vanfelson nous a dit qu'il fallait mettre de côté la stipulation du douaire ou l'autre clause si c'est un ameublissement. Il est évident en effet que si la clause en question est véritablement un ameublissement de tous les biens des futurs époux, c'est la mettre de côté que d'accorder le douaire. La clause en question doit gouverner tout le contrat, et si elle est claire et positive, elle doit faire écarter toutes les autres clauses qui pourraient lui sembler contraires. C'est là une proposition générale que nous adoptons ; prenant ensuite cette clause, quoiqu'inusité dans la forme de sa rédaction, nous trouvons qu'elle peut se concilier, en partie du moins, avec les autres stipulations de l'acte.

La première clause établit qu'il y aura communauté de biens suivant la coutume de Paris, les parties dérogeant à toutes autres lois et coutumes contraires. Vient ensuite la clause de séparation de dettes ; puis la troisième clause - objet de la controverse ; mais avant de s'y arrêter il est à propos d'observer que l'effet de la première clause était de faire tomber dans la communauté tous les meubles des parties, les conquets et les fruits des propres. La troisième clause est comme suit : "Et se prennent les dits futurs époux " avec leurs biens et droits à chacun d'eux appartenants, et " tels qu'ils pourront leur écheoir ci-après, à quelque titre " que ce soit, lesquels dits biens meubles ou immeubles " entreront dans la dite communauté. "

On trouve dans cette clause tout ce qui est requis, et il est impossible de réunir des mots qui pussent exprimer aussi bien et sans ambiguïté l'intention des parties. Si ces termes renferment toutes espèces de biens des futurs époux, l'ameublissement est général et absolue ; et si on ne lui

donne pas cette interprétation que signifiera-t-elle ? elle n'ajoutera rien à ce qui est stipulé dans la première clause, qui fait tomber dans la communauté tous les biens meubles et conques immeubles. Si on recherche dans les auteurs quels sont les termes qui comportent l'ameublement, il ne peut y avoir de doute sur la clause dont il s'agit. (1) Suivant Guyot, il suffit de stipuler que les futurs conjoints *seront communs dans tous leurs biens* pour en opérer l'ameublement. (2).

Je n'ai donc aucun doute que dans l'interprétation juste des termes dont on s'est servi ici, il est impossible de n'y pas trouver un ameublement. La clause est formelle et doit dominer toutes les autres conventions, même celle du douaire que la femme prendra où elle pourra le trouver. Elle a d'ailleurs l'option, et peut prendre le prefix si elle ne peut avoir le coutumier. La clause en question est dans les termes ordinaires pour les cas d'ameublement dont l'effet est de faire disparaître le douaire coutumier. Comme les stipulations doivent être restreintes aux cas prévus par les parties, dans le cas présent la question à décider est de savoir si, après renonciation et rétablissement des propres, la femme peut avoir le douaire coutumier. (3).

Ici la femme a droit en renonçant de reprendre son apport avec aussi son douaire, cette convention ne fait que confirmer l'ameublement et l'aide. Quant à la clause du remplacement des propres, quoique par l'ameublement le mari puisse aliéner, les deux clauses néanmoins peuvent se concilier, quoique la clause de remplacement soit rédigée dans des termes quelque peu extraordinaires. (4) Pothier établit que la clause de reprise et celle d'ameublement doivent se concilier. Quant à la clause de séparation de dettes, son effet est de faire supporter par le conjoint, sur sa part de la com-

(1) Pothier, Communauté, No. 303.

(2) Rep. Ameublement :—Nouv. Denisart :—Reausson, ch. 6, sect. 1, Communauté.

(3) Pothier, Douaire, No. 28.

(4) Pothier, Communauté, No. 419.

munauté, le paiement de ses dettes payées pendant la communauté, ce qui n'est pas inconsistant avec la stipulation d'ameublissement. Vide Pothier, Communauté, No. 361. Je pourrais également faire voir que tout ce qui est requis par le passage de Troplong, cité par l'honorable juge Vanfelson, se rencontre ici. La majorité de la cour croit donc que la clause en question est un véritable ameublissement, et que l'action de la Demanderesse doit en conséquence être déboutée.

C. MONDELET, Juge :—Il ne s'agit point ici de savoir si toutes les clauses du contrat peuvent se concilier, quoique sur ce point je concoure pleinement dans les observations si claires du savant Président de la cour, nonobstant tout le respect que j'ai pour les lumières et l'expérience de l'honorable juge Vanfelson. La seule question à juger est celle-ci : de deux stipulations et clauses d'un contrat qui semblent opposées et inconciliables, laquelle doit être mise de côté ? En stipulant ainsi que les parties l'ont fait en cette cause, elles sont censées avoir connu la loi, et s'être soumises aux conséquences de telles conventions. Par la troisième clause du contrat sous considération elles ont stipulé que tous leurs biens entreraient en communauté. Je ne puis rien voir de plus emphatiques que les termes dont on s'est servi ; ils sont génériques et offrent ainsi moins de difficulté que lorsqu'il y a énumération. Rien n'est excepté, tous les biens meubles et immeubles à quelque titre qu'il soient venus aux conjoints tombent dans la communauté, telle a été la convention et l'intention manifeste des conjoints. Il y a donc eu ameublissement, et le douaire coutumier ne peut conséquemment avoir lieu sur les biens ainsi ameublis.

JUGEMENT :—“Considering that by the contract of marriage between the late Amable Martineau and Ursule Lemieux, in the declaration of the Plaintiff, and also in the exception of the Intervening party in this cause pleaded, mentioned, the said Amable Martineau and Ursule Lemieux did stipulate and agree that a community of property, *communauté de biens*,

should be and subsist between them according to the Custom of Paris, and did by a clause, *d'ameublissement*, in the said contract contained, stipulate and agree that the moveable and immoveable property and rights to them belonging, or which might afterwards come to them by any title whatever, should enter into and make part of the said community of property, by virtue of which said stipulations the lot of land and premises, in the said declaration described, and one moiety whereof the Plaintiffs seek to recover, was, by fiction of law, made moveable, *ameublie*, and entered into the said community of property, and that by reason thereof, and by law, the same was not, nor is affected or holden, or in any manner liable, as or for the customary dower of the said late Ursule Lemieux, and the Plaintiffs ought not to recover or have the moiety of the said lot of land and premises, or any other portion thereof, for the reasons by them in their said declaration alleged ; maintaining the said Intervention and the exception by him in this cause pleaded, doth dismiss the action of the Plaintiffs, with cost to the Intervening party, as well of the said Intervention as of the contestation of the said action. (The Hon. Mr. Justice Vanfelson dissenting)

MOREAU, LEBLANC et CASSIDY, pour la Demanderesse.

CROSS et COFFIN, pour l'Intervenant.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief-Judge, and MEREDITH, Justice.

No. 695. { HAYES,..... Plaintiff,
vs.
KELLY,..... Defendant.

Held :—That an affidavit for a writ of *saisie arrêt* in which it is stated "That de- Jugé :—Qu'un affidavit pour saisie arrêt dans lequel il est allégué " Que le dé-
ponent is credibly informed, hath every- sant est informé d'une manière croyable, reason to believe, and doth verily in his à toute raison de croire, et croit vraiment conscience believe, &c., " is sufficient, being en sa conscience, etc." est suffisant, étant according to the form laid down in the 9^e suivant la forme prescrite par la 9^e Geo. Geo. 4, Ch. 27. IV, Cap. 27.

Judgment rendered 1st day of September, 1855.

This case was submitted to the Court upon a motion by.

the Defendant to quash the writ of *saisie arrêt* issued in the cause, upon the ground :—

That all that was prayed for by the affidavit upon which the *saisie arrêt* in the cause issued, was a writ of *saisie arrêt*, whereas the writ issued was a writ of *saisie arrêt en main tierce.*

That the writ which had issued in the cause was not the writ prayed for.

JUDGMENT:—The Court, &c., considering that the reasons set forth by the said Defendant in the motion to quash the writ of *saisie arrêt* in this cause issued, are insufficient to set aside the said *saisie arrêt*, the Court overrules the said motion with costs against the Defendant.

Ross, Sol.-General, for Plaintiff.

CASSEAU and LANGLOIS, for Defendant.

SUPERIOR COURT.—QUEBEC.

Before STUART, Assistant Judge.

Held —That no silver coin of the United States of America, is legal money in the Province of Canada.

Judgment rendered the 7th September 1855.

The Defendant, who was detained in gaol at the instance
of the Plaintiff, presented a petition to be released from cus-
tody, upon the ground that the Plaintiff had failed to tender
him the sum of five shillings, currency, as and for his alimen-
tary allowance for the then current week, as he was bound
to do, but that on the contrary he had merely tendered, or
caused to be tendered to him, for the purpose aforesaid, two sil-
ver coins, purporting to be of the value of half a dollar each,

of the coinage of the United States of America. The petition set forth that the said tender was illegal and invalid, and could not be considered to be the tender of five shillings, ordered by the Court to be paid, nor equivalent thereto, inasmuch as no silver coin whatever of the United States of America, was legal current money in this Province ; that the Provincial Statute 16 Vic. Ch. 158, enacted that no silver coin, except of the coinage of the United Kingdom, should be legal current coin in this Province ; and prayed that he, the Petitioner, should therefore be discharged from custody.

STUART, Assistant Judge :—Upon granting the prayer of the petition and ordering the Petitioner to be discharged from gaol, remarked ; that from the number of acts which had been passed by the legislature regulating the coin of this Province, there could be no doubt that in the act above referred to, the legislature had intentionally omitted to give legal effect to silver coin of the coinage of the United States of America ; and that the tender made to the Petitioner in this case, must therefore be considered illegal and invalid ; and that the Petitioner was consequently entitled to his discharge.

The Petitioner was accordingly discharged from custody.

POPE, for Petitioner.

LELIEVRE and **ANGERS**, for Plaintiff.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

No. 123. { MARSHALL,..... *Plaintiff*,
 vs.
 THE GRAND TRUNK RAILWAY COMPANY OF
 CANADA,..... *Defendants*.

Held:—That the provisions of the 8th Vict. Ch. 25, Sec. 49; and 14th and 15th Vict. Ch. 51, Sec. 20, as to the initiation of actions against Railway Companies, and others, within the period of six months, do not apply to actions for damages arising from neglect and carelessness of the Company's servants in the ordinary management of the Railroad.

Jugé:—Que les dispositions de la 8me Vict. Ch. 25, Sec. 49 et les 14me et 15me Vict. Ch. 51, Sec 20, quant à l'initiation d'actions contre les Compagnies de Chemins de Fer, et autres, dans l'espace de six mois, ne s'appliquent pas aux actions pour dommages résultants de la négligence ou manque de précaution des employés de la Compagnie.

Judgment rendered the 22nd May 1855.

This action was instituted on the 24th June 1854, to recover damages for injuries alleged to have been sustained, on the 11th October 1853, by the Plaintiff having been run over, and his arm broken, by a locomotive engine in charge of the Defendant's servants, the accident being the result of their negligence.

The first exception pleaded by the Defendants set up that the alleged injury took place at Waterville, in the Township of Compton, in the district of St. Francis, on a portion of the road built by the St. Lawrence and Atlantic Railroad Company, and that by various Statutes and agreements referred to in the exceptions, the Defendants were vested with all the powers and privileges of the St. Lawrence and Atlantic Railroad Company, under their Act of Incorporation 8th Vict. Ch. 25, and of other Companies, united and consolidated with the Grand Trunk Railway Company of Canada. That by these Statutes the action of the Plaintiff was prescribed, more than six months having elapsed between the date of the alleged injury, and the institution of the action.

The Plaintiff to this exception filed an answer in law in the nature of a demurrer, on which the parties were heard.

DAY, Justice : In rendering judgment, referred to the 49th section of the "act 8th Vict. Ch. 25, and also to "The Railway Clauses Consolidation Act" 14th and 15th Vict. Ch. 51, Sec. 20, quoted below, and stated that in the opinion of the Court, the sections referred to did not apply to cases, like the present, of negligence and carelessness in the ordinary management of the Railroad, but were intended rather to protect the Company by giving them recourse against contractors and others, guilty of *voies de faits* in the construction of the road, or in carrying out the provisions of the acts conferring special powers on the Company, by limiting the time within which actions must be brought against the Company, and thereby giving the Company an opportunity of being reimbursed.

JUDGMENT : " The Court having heard the parties by their " Counsel upon the law issue, raised by the answer *en droit*, " in the nature of a demurrer, of the Plaintiff, to the peremptory exception, in the cause firstly pleaded by the said Defendants, having examined the declaration of the Plaintiff " in this cause filed, and the said exception and answer " thereto, and deliberated, doth maintain the said peremptory exception, and doth dismiss the said answer *en droit* or " demurrer with costs.

MACK, for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

Here follow the two clauses above referred to :

" And be it enacted that if any action or suit shall be " brought or commenced against any person or persons for " any thing done or to be done in pursuance of this Act, or " in the execution of the powers and authorities, or the orders and directions hereinbefore given or granted, every " such action or suit shall be brought or commenced within " six calendar months next after the fact committed ; or in

"case there shall be a continuation of damage, then within
 "six calendar months next after the doing or committing
 "such damage shall cease, and not afterwards ; and the de-
 "fendant or defendants in such action or suit shall and may
 "plead the general issue, and give this act and the special
 "matter in evidence at any trial to be held thereupon, and
 "that the same was done in pursuance, and by the authority
 "of this act, and if it shall appear to have been so done, or
 "if any action or suit shall be brought after the time so li-
 "mited for bringing the same, or if the plaintiff or plaintiffs
 "shall be non-suited, or discontinue his, her or their action or
 "suit, after the defendant or defendants shall have appeared,
 "or if judgment shall be given against the plaintiff or plain-
 "tiffs, the defendant or defendants shall have full costs, and
 "shall have such remedy for the same as any defendant or
 "defendants hath or have for costs of suit in other cases by
 "law."

" And be it enacted : That, firstly, all suits for indemnity
 "for any damage or injury sustained by reason of the Rail-
 "way, shall be instituted within six calendar months next
 "after the time of such supposed damage sustained, or if
 "there shall be continuation of damage, then within six
 "calendar months next after the doing or committing such
 "damage shall cease, and not afterwards ; and the defen-
 "dants may plead the general issue, and give this act, and
 "the special act, and the special matter, in evidence at any
 "trial to be had thereupon, and may prove that the same
 "was done in pursuance of and by authority of, this act and
 "the special act." (1)

(1) 8th Vict. ch. 25, sec. 49 :—14th and 15th Vict. Ch. 51, sec. 20.

SUPERIOR COURT.—QUÉBEC.

Before STUART, GAUTHIER and TASCHEREAU, Assistant Judges.

No. 2234. { EASTON,..... Plaintiff.
 { BENSON,..... Defendant.

*Held:—That where a Defendant files Juge:—Quo dans les cas de l'enfisure
 an exception à la forme, in a case where sid' une exception à la forme, dans une cause
 rule has been made absolute staying all out il a été ordonné une suspension de pro-
 ceedings until the Plaintiff shall have cōdūre jusqu'à ce que le Demandeur ait
 put in security for costs, the Plaintiff indoné caution pour les frais, il de sera pas
 not entitled to a hearing upon the merits permis à tel Demandeur d'être entendu
 of such exception, till he shall have put in sur les mérites de l'exception à la forme,
 security for costs.
 avant que le cautionnement ordonné ait
 été fourni.*

Judgment rendered the 4th October 1855.

This case was heard upon a motion by the Plaintiff for a hearing upon the merits of the *exception à la forme* in the cause filed by the Defendant.

The Plaintiff's action was returned into Court on the 1st day of September 1855; the Defendant regularly appeared, and on the same day, the 3rd of September, the Plaintiff having alleged in his declaration that he was a resident of Upper Canada, he, the Defendant, obtained a rule staying all proceedings in the cause till the Plaintiff should have put in security for costs. This rule was made absolute on the 5th, and on the same day the Defendant filed an *exception à la forme* to the Plaintiff's action. The Plaintiff theretupon moved for a hearing upon the merits of the *exception à la forme*, without an answer; and upon this motion the present judgment was pronounced.

The Defendant objected to the reception of the motion upon the ground that it could not be entertained, inasmuch as the Plaintiff had not put in security for costs, in compliance with the rule to that effect by him obtained; and that, consequently, the Plaintiff was not entitled to a hearing upon the merits of the Defendant's *exception à la forme*, till he should have put in security for costs.

The Plaintiff alleged that the Defendant, having filed his *exception à la forme* after the making absolute of the rule staying all proceedings till the Plaintiff should have put in security for costs, had waived his right to the effect of the rule, and that, therefore, the Plaintiff had a right to a hearing upon the merits of the *exception*, according to the terms of his motion, and said that a cause had lately been decided in Montreal, where an *exception à la forme* had been held to be regularly filed after the putting in of security, although the period of four days, from the date of the return, had expired.

The Defendant's counsel maintained that according to the terms of the 16 Vic. Cap. 194, Sec. 21, all exceptions and preliminary pleas must be filed within four days, from the day of the return of the writ, or of the filing of the pleading to which such preliminary exception or plea was opposed; and cited the case of Macfarlane *vs.* Worrall, 4 Lower Canada Reports, p. 97, in support of his argument. He further argued, that the decision, which the Plaintiff invoked in support of his motion, was not at all analogous to the present case, as that decision merely went to shew that an *exception à la forme*, filed after the time prescribed by the above act, would be considered regular, the rule for security for costs being held suspensive of proceedings, yet that it did not go to establish that an *exception à la forme*, filed within the time prescribed by law, would be held to be irregularly filed, in other words, that the Defendant having complied with the precise terms of the law, should therefore be held to have perfected his right to security for costs. That not having violated the law he must therefore be punished; the decision was therefore not at all in point, and had no reference to the present case whatever; and the Plaintiff's motion must, therefore, be discharged with costs.

The motion was accordingly discharged with costs against the Plaintiff.

- PENTLAND and PENTLAND, for Plaintiff.

POPE, for Defendant.

BANC DE LA REINE } DISTRICT DE MONTREAL.
EN APPEL.

Présents Sir L. H. LA FONTAINE, Baronnet, Juge-en-Chef,
AYLWIN, DUVAL et CARON, Juges.

{ BEAUDET,.....	<i>Appelant,</i>
{ DORION,.....	<i>et</i> <i>Intimé.</i>

Jugé :—
1o. Que dans le Bas-Canada, la tutelle est dative, et conférée par le juge, et tutorat is *dative* and conferred by the non par l'avis de parents, qui n'est qu'un judge, and not by the advice of the relations mode d'enquête pour aider le juge dans les relations, which is only a mode of inquiry to aid the judge in the exercise of this attribute.

2o. Qu'une tutelle n'est pas nulle de plein droit à raison de ce qu'un des ayens des mineurs n'a pas été appelé à l'assemblée des parents, et qu'elle ne doit pas être remise de côté, si l'intérêt des mineurs n'est pas affecté par suite de cette omission.

3o. Que la tutelle doit être déferée par le juge du dernier domicile du père décédé,

lequel domicile reste celui des mineurs.

4o. Que, dans l'espèce, le père avait conservé son domicile dans le district de Montréal, quoiqu'il eût résidé en dernier lieu dans un autre district, et fût décédé à l'étranger.

5o. Que, dans le cas de deux tutelles en deux juridictions différentes, le tribunal, appelé à prononcer sur celle qui a eu lieu dans sa juridiction, peut et doit également prononcer sur la validité de l'autre, si elle est mise en question.

Held :—
1o. That in Lower Canada, the tutelle is *dative* and conferred by the judge, and not by the advice of the relations, which is only a mode of inquiry to aid the judge in the exercise of this attribute.

2o. That a *tutelle* is not *de facto* null, by reason of one of the grand fathers not having been called to the meeting of the relations, and that the said *tutelle* ought not to be set aside, if the interests of the minors are not affected by such omission.

3o. That the *tutelle* must be conferred by the judge of the last domicile of the deceased father, which domicil continues to be not affected by such omission.

4o. That, in the present instance, the father had continued his domicil in the district of Montreal, although he had latterly resided in another, and died abroad.

5o. That in the event of two *tutelles* being conferred in two distinct jurisdictions the Court called to adjudicate upon the one conferred in its jurisdiction, may aid is bound equally to pronounce upon the validity of the other, if the same is brought into question.

Jugement rendu le 12 Mars 1855.

Le jugement dont est appel fut rendu par la Cour Supérieure à Montréal, le 30 décembre 1853, sur une requête présentée par l'Intimé, exposant, que sur avis de parents donné le 19 janvier 1852, et homologué par le juge le 26 mars 1852, dans le district des Trois Rivières, il avait été nommé tuteur (comme il devait l'être étant l'ayant paternel) des enfants mineurs issus du mariage de William Oscar Dunn, et Mathilde Marie Anne Beaudet ; que néanmoins l'Appelant aurait pris l'administration en vertu d'un avis de parents pris le 24 janvier 1852, et homologué le 27 janvier

1852, le nommant tuteur, cette nomination ayant été obtenue, sous de fausses représentations, sans y avoir appelé l'Intimé, et ce dans une jurisdicition qui n'était pas celle du domicile des mineurs. Il concluait à ce que la nomination de l'Appelant fut déclarée irrégulière et illégale, un tuteur ayant été précédemment nommé, et une tutelle valable et suffisante existant avant et lors de la nomination du dit Appelant, et que cette dite dernière nomination fut annulée et mise de côté. (1)

L'Appelant répondit à cette Requête, que le mariage entre le dit feu Dunn, et la dite Mathilde Beaudet, fut célébré par un ministre de l'Eglise Catholique Romaine, et fut précédé d'un engagement par écrit, sur le registre de la paroisse St. Ignace du Côteau du Lac, de la part du dit feu Dunn, de laisser aux enfants qui naîtraient du dit mariage toute liberté de suivre la religion Catholique, apostolique et Romaine ; sans lequel engagement, le dit mariage n'eût pas été contracté ; que plusieurs enfants étaient nés de ce mariage ; que le 21 octobre 1851, la dite Mathilde Beaudet étant morte, le dit W. O. Dunn fut nommé tuteur et l'Appelant subrogé tuteur, et ce dans le district de Montréal où était alors le domicile du dit W. O. Dunn ; domicile qui n'avait pas été changé depuis, nonobstant que le dit W. O. Dunn, en était absent pour raison de santé, étant allé passer quelques temps chez l'Intimé, dans le district des Trois Rivières, et ensuite aux Isles de la Bermude, où il était mort ; qu'après son décès, l'Appelant, en sa qualité de subrogé tuteur aurait fait convoquer, dans la paroisse du Côteau du Lac, où avait toujours résidé le dit W. O. Dunn, une assemblée de parents pour procéder à une tutelle nouvelle ; que sur l'avis des parents ainsi assemblés le 24 janvier 1852, l'Appelant avait été nommé tuteur, et cet avis homologué le 27 du même mois ; l'Appelant alléguait qu'il

(1) Autorités citées par l'intimé :—14 et 15 Vic. ch. 58 :—Meaté, Tutelles et Minorités, pp. 16, 98, 438 :—2. Toullier No. 1123 :—41 Geo. 3, ch. 2 :—Troplong, Priviléges, No. 428 :—Phillimore, Law of Domicil, ch. 7 :—2. Toullier, No. 1119 :—Merlin, Repert. vbo. Tutelle.

avait droit d'être ainsi nommé tuteur, étant le plus proche-parent résidant dans la juridiction où les mineurs avaient leur domicile et leurs biens, et comme professant la même religion que les dits mineurs, et étant plus en état de leur enseigner cette religion que l'Intimé, et sa famille, qui professaient une religion différente. Il alléguait encore qu'il était plus dans l'intérêt des mineurs que lui, l'Appelant, fut nommé leur tuteur ; que la nomination de l'Intimé faite sur avis de parents le 19 avril, n'avait aucune valeur, et que cet avis de parents n'avait été homologué que postérieurement à celle de l'Appelant, et qu'elle était d'ailleurs illégale, ayant eu lieu dans une juridiction autre que celle du dernier domicile du dit W. O. Dunn. Les conclusions de l'Appelant tendaient à se faire maintenir dans la charge de tuteur, et à faire déclarer nulle la nomination de l'Appelant.

La Cour Supérieure après enquête, déclara la nomination de l'Appelant nulle avec dépens contre lui. (1)

Sir L. H. LA FONTAINE, Juge en Chef :—L'Appelant et l'Intimé ont été tous deux nommés tuteurs aux deux enfants mineurs du docteur Dunn. L'un l'a été dans le district de Montréal, et l'autre dans le district des Trois-Rivières. Sur la Requête de ce dernier (l'Intimé) présentée à la Cour Supérieure, siégeant à Montréal, s'est engagée la question de savoir laquelle, de ces deux tutelles, devait prévaloir. Le Tribunal de première instance a déclaré nulle la tutelle déférée à l'Appelant ; mais il s'est abstenu de prononcer sur la validité de celle déférée à l'Intimé.

(1) Autorités de l'Appelant :—Pothier, Personnes, pp. 610, 611 :—Toullier, pp. 226, 227, 235 :—Merlin, Report vbo. Tuteur :—Sirey, Jurisp. de Cassations, 1815, 2 partie, pp. 216, 218 :—34 Geo. 3, ch. 6, sect. 9 :—Code civil, art. 406, 407, 410 :—7. Desp. Lombé Nos. 327, 328, 332, 251 bis. :—2. Toullier, No. 1119 :—

Dallos, Rec. period : 1839;	2me partie,	p. 97.
Ibidem,	1838	1er " p. 163.
" "	1837	2me " p. 8.
" "	1826	1er " p. 420.

Henry vs. Moreau St. Remy.

2. Vallet sur Prudhon, Etat des Personnes, p. 328 :—1. Teulet, Code civil, p. 22, Nos. 26 à 32 :—2. Toullier, No. 34 :—Nouv. Denisart vbo. Domicile, p. 656, No. 6, 4 aliqes No. 7 :—Merlin, Report vbo. Domicile, p. 5., No. 3 :—

Ibidem, Tutelle, sect. 2, p. 3, art. 3 :—2. Toullier, Nos. 114, 1112, à 1122 :—1. Journal des Audiences, liv. 1, ch. 29 :—2. Bardet, liv. 7, ch. 8, arrêt de 1638 :—41, Geo. 3, ch. 7, sect. 18 :—1. Du Parc Poulin, p. 246.

Les principaux moyens articulés dans la Requête pour soutenir la nullité de la tutelle de l'Appelant, étaient, en substance : 1o. qu'elle ne pouvait pas être légalement déferée à Beaudet dans le district de Montréal, les enfants ayant alors leur domicile dans le district des Trois-Rivières, en un mot que c'était au juge du domicile à déferer la tutelle ; 2o. que deux tutelles ne pouvaient pas subsister en même temps, celle de l'Intimé devait prévaloir puisqu'elle était antérieure en date, qu'en outre elle était la seule qui fut valable puisqu'elle lui avait été déferée par le juge du domicile des mineurs ; 3o. que l'Intimé, (ayeul paternel des mineurs) n'avait pas été appelé à l'assemblée des parents et amis, tenue dans le district de Montréal.

Puisque l'Intimé prétend que c'est au juge du domicile des mineurs qu'appartient la tutelle, (1) il ne pourra pas se plaindre du renvoi du chef de sa demande, qui repose sur cette proposition, s'il est établi, en fait, que les mineurs Dunn avaient leur domicile non dans le district des Trois-Rivières, mais bien dans celui de Montréal, dans la paroisse même où demeure l'Appelant, leur ayeul maternel.

La première question de fait à examiner est donc celle de savoir dans quel district le Docteur William Oscar Dunn avait son domicile lors de son décès. Ce domicile était dans la paroisse de St. Ignace du Côteau du Lac, comté de Vandreuil, district de Montréal. Le Dr. Dunn y avait épousé Marie-Anne Mathilde Beaudet, le 15 janvier 1844 ; il y a toujours demeuré depuis son mariage, et exercé sa profession de médecin.

(1) Pour l'affirmative, l'on peut invoquer :—*Méth. des Tutelles*, ch. 7, p. 84 :—*Gillet, des Tutelles*, Ed. de 1698, ch. 7, p. 11 :—*Pothier, des Personnes*, tit. 6, sect. 4, art. 1, sect. 2 :—*Nouv. Denisart*, tit. 6, vbo. *Domicile*, sect. 1, p. 652, No. 2 :—*Pothier, G. d'Orléans*, sur l'art. 193, note 2 :—*2. Pigeau*, p. 302 :—*2. Tutelles*, liv. 1, des *Personnes*, tit. 10, No. 1114 :—*35. Merlin*, Ed. in-8, vbo. *Tutelle*, sect. 2 et 3, p. 216 et suiv. :—*Merlin*, vbo. *Domicile*, sect. 5, p. 347, No. 3 :—*Les trois Déclarations* des 15 déc. 1721, 1er oct. 1741 et 1er février 1743, (enregistrées en Canada), au sujet de la Nomination des Tuteurs, (voir 1er vol. des *Edits et Ord.*, pp. 329, 512, et 520) :—*Actes Prov.* 34, Geo. 3, ch. 6, sect. 8 et 9 :—*41 Geo. 3, ch. 7, sect. 18* :—*14 et 15 Vict.* ch. 83, sect. 8.

“ Le domicile est le lieu où une personne, jouissant de “ ses droits, établit sa demeure et le siège de sa fortune.” (Nouv. Denisart, t. 6, au mot “ Domicile,” § 1, p. 652. No 1.)

Dans le printemps de 1851, le Dr. Dunn, étant malade, alla passer quelque temps chez son frère, ou chez son père, l’Intimé, dans le district des Trois-Rivières. Plus tard, sa femme alla l’y voir avec ses deux enfants ; malade elle-même, elle mourut peu de jours après son arrivée. De là, l’Intimé prétend qu’il y a eu réellement changement de domicile de la part du Dr. Dunn, son fils, et qu’à sa mort, arrivée aux Bermudes, le 15 décembre 1851, le dernier domicile qu’il avait laissé en Canada était chez lui, l’Intimé, à Ste. Ursule, dans le district des Trois-Rivières.

Les faits ne me paraissent pas justifier en aucune manière cette prétention de l’Intimé. Lorsque dans le printemps de 1851, le Dr. Dunn prit le parti de voyager pour sa santé, il avait depuis plusieurs années un domicile fixe au Côteau du Lac, où il vivait avec sa famille et avait ménage et maison. Il était même, à cette époque, le maire de la Municipalité du comté de Vaudreuil. Il partit seul pour aller se promener chez son père, laissant sa femme et ses enfants à son domicile au Côteau du Lac, domicile qu’il n’a jamais eu l’intention d’abandonner, ni avant ni après ce départ.

Dans une lettre, datée de la Rivière-du-Loup, (paroisse voisine de celle de Ste. Ursule), 18 mai 1851, et adressée à sa femme au Côteau du Lac, après lui avoir parlé de sa santé, il lui dit : “ *My thoughts are at home.* ” Sa femme se détermine à aller le voir à Ste. Ursule ; elle y conduit ses enfants vers le 6 juin ; elle y meurt le 29 du même mois. Son mari, loin de lui donner la sépulture dans la paroisse de son prétendu nouveau domicile, fait transporter ses restes au Côteau du Lac, où ils sont inhumés le 3 juillet.

Dans une autre lettre du 10 juillet, datée de Maskinongé, district des Trois-Rivières, écrite à son beau-frère, George

Beaudet, du Côteau du Lac, après lui avoir dit qu'il est en route pour Québec où il veut aller consulter un médecin, il ajoute : " From thence, I will go up to Coteau. I assure you " my dear George, that I feel very anxious to get back, &c., " &c. ; my sister, Suzan, with my little children and the girl, " will leave this, thursday, to go up, and will leave Mont- " real friday morning for *Côteau* by the way of the Cas- " cades.... If I arrive in time, I will go up that way, if not, " I will go up through the Canal. "

Puis nous lisons dans une autre lettre, qu'il écrit de Ste. Ursule, le lendemain 11 juillet, à son beau père, l'Appelant : " You can rest assured that I will go back to *Côteau* " as soon as possible. If I gain strength, or even if I do not " lose any, I will leave in eight or ten days, say a week " from monday next. I now feel as anxious to get back " as I felt anxious to leave in the spring. If it pleases God " to restore me to my former health, I will resume my " practice. "

Quelque temps après, on le voit revenir au Côteau du Lac, et se faire élire tuteur de ses enfants, non dans la Jurisdiction du district des Trois-Rivières, mais bien dans celle du district de Montréal, le 20 octobre 1851. Puis était présent à l'assemblée de parents et amis, qui avait précédé sa nomination, son frère Charles E. Dunn, celui-là même sur la requête duquel il a été plus tard, dans le district des Trois-Rivières, adopté des procédés pour faire nommer un nouveau tuteur aux mineurs.

Il est admis par les parties en cause que c'est vers le 1er novembre 1851, que le Dr. Dunn est parti pour les Bermudes. Eh bien, deux jours avant ce départ, le 30 octobre, on le voit encore se dire de la paroisse du Côteau du Lac dans une procuration qu'il donne à ce même frère, et qui est reçue devant Notaires dans cette même paroisse. Lorsqu'il se met en voyage, il part donc de son domicile au Côteau du Lac, où, en outre, il laisse tout son ménage dans la maison qu'il y avait occupé jusqu'alors. Ce domi-

oile devient donc, à sa mort, arrivée aux Bermudes six semaines après son départ, le dernier domicile qu'il avait eu en Canada.

Les membres mêmes de sa propre famille ne regardaient son séjour chez son père, en 1851, que comme temporaire. Nous en avons la preuve dans une lettre que son frère, le dit Charles E. Dunn, adressait de Maskinongé à l'Appelant, sans date précise il est vrai, mais évidemment écrite dans le mois de juin 1851, dans laquelle il lui disait : " It would " afford them great pleasure to see Oscar strong enough to " start for the Côteau at once.... ; the sooner both Mathilda " and him start for the sea shore, the better. "

En présence de tous ces faits, le dit Charles E. Dunn, (car c'est lui, et non pas l'Intimé, qui a provoqué l'élection d'un tuteur dans le district des Trois-Rivières), n'avait aucune raison d'alléguer, comme il l'a fait dans sa requête au Notaire Carufel, que son frère, le Dr. Dunn, avant et après la mort de sa femme, avait adopté Ste. Ursule comme place de résidence.

" Le domicile s'acquiert par le concours du fait et de l'intention, c'est-à-dire, de la résidence effective et de l'intention manifeste de fixer son domicile en un lieu. " (1) Or il est évident que le Dr. Dunn n'a pas eu, en 1851, de résidence effective dans la paroisse de Ste. Ursule ; qu'il n'a pas eu même l'intention d'y fixer son domicile. Si donc, comme le prétend l'Intimé, le juge du Domicile est le juge de la tutelle, il s'ensuit que celle déferée à l'Appelant lui a été déferlée par le Juge seul qui en avait le pouvoir, ce Juge étant celui du domicile des mineurs, puisqu'en pareil cas le dernier domicile du père continu d'être celui de ses enfants. (2) Par contre coup, il résulte de la proposition de l'Intimé que sa tutelle, ne lui ayant pas été déferlée par le juge du domicile des mineurs, devrait être déclarée nulle.

(1) Nouv. Denisart, vbo. Domicile, p. 652, sect. 1, No. 2. — S. Martin, vbo. Domicile sect. 2, p. 337.

(2) Nouv. Denisart, vbo. Domicile, p. 652, No. 2. — 2. Vuillier, No. 1114. — S. Martin, vbo. Domicile, sect. 5, p. 247.

2e Proposition : Que deux tutelles ne peuvent pas subsister en même temps, soit. Ainsi, en supposant qu'il pouvait être procédé à la tutelle des mineurs Dunn dans l'un ou l'autre district, il faut bien que des deux tutelles dont il s'agit, l'une cède le pas à l'autre, c'est-à-dire, que l'une est valable, et que l'autre ne l'est pas. Or celle qui, en pareil cas, doit subsister, ne peut être, de l'aveu même de l'Intimé, que celle qui a, en sa faveur, l'antériorité du décret du Juge qui l'a déférée en homologuant l'avis de parents et amis qui l'a précédée, car c'est le juge qui *nomme* le tuteur et non les parents et amis, dont l'assemblée préalable ne constitue qu'un *moyen d'enquête*, et dont l'*avis* ne peut servir que de *motif* au juge pour arrêter sa détermination, puisqu'il n'est pas obligé de nommer la personne indiquée dans cet avis. (1) Dans l'espèce actuelle, la *nomination* de l'Appelant, qui a eu lieu le 27 janvier 1852, date du décret homologatif du juge de Montréal, est antérieure en date à la *nomination* de l'Intimé, qui n'aurait eu lieu que le 26 mars suivant, date du décret du juge des Trois-Rivières. Il est vrai qu'il n'en est pas de même des deux avis de parents qui ont respectivement précédé ces nominations, celui pris dans le district des Trois-Rivières étant en date du 19 janvier 1852, tandis que celui recueilli dans le district de Montréal, ne l'a été que cinq jours plus tard, le 24 du même mois. Mais ce n'est pas cet avis de parents qui confère la tutelle, ainsi que le prétend, à tort, l'Intimé, c'est le décret du juge. Nos lois d'enregistrement exigent l'enregistrement de l'acte de tutelle ; ce ne serait pas remplir cette formalité que d'enregistrer seulement un avis de parents non suivi d'homologation, en d'autres mots non-suivi de la *nomination* du tuteur par le juge. C'est cette nomination, l'acte du juge, qui, dans l'ancien droit français, qui est le nôtre, donne la qualité de tuteur, et non l'avis de parents, ou du conseil de famille, comme cela a lieu aujourd'hui en France. Sous l'empire du nouveau Code, et où " la tutelle dative est celle

(1) Pothier, *Des Personnes*, pp. 610 et 611 :—Meaté, pp. 90, 93.

qui est déférée," dit Demolombe, t. 7, p. 116, Nos. 189 et 191 : " non point, comme autrefois, par le juge, d'après un avis de parents, mais directement par les parents eux-mêmes, c'est-à-dire, par le conseil de famille," (art. 405) " cette nomination n'est point d'ailleurs sujette à homologation."

Ainsi, sur la question d'antériorité de tutelle, l'Intimé doit donc encore succomber.

Se proposition de l'Intimé : Que la tutelle déférée à l'Appelant est nulle, parce que lui, l'Intimé, n'a pas été appelé à l'assemblée de parents qui l'a précédée. Si cette proposition est exacte, la tutelle de l'Appelant n'est pas la seule qui doit être déclarée nulle ; il faut aussi, pour la même raison, déclarer nulle celle de l'Intimé, puisque l'Appelant n'a pas été appelé à l'assemblée de parents qui l'a précédée ; les deux parties étant parents des mineurs au même degré. Admettant que l'un et l'autre pussent avoir les mêmes prétentions à la tutelle, il y avait néanmoins une circonstance qui militait en faveur de l'Appelant. Il était déjà le subrogé-tuteur des mineurs, et c'est lui qui, dans le district de Montréal, en accomplissement de ses obligations, et comme subrogé-tuteur, et comme plus proche parent, a provoqué la nomination d'un nouveau tuteur après le décès du Dr. Dunn, tandis que dans le district des Trois-Rivières, c'est un oncle paternel, et non l'Intimé, qui a provoqué cette nomination. Au reste, quant au point principal que soulève cette troisième proposition, il n'existe pas, que je sache, aucune loi qui exigeait, sous peine de nullité *absolute*, d'appeler à l'assemblée l'Intimé, quoique l'un des deux plus proches parents des mineurs, même s'il eût eu son domicile dans la juridiction de Montréal. Tout est laissé, en pareil cas, à la discrétion du juge, et si l'omission d'appeler ce proche parent peut entraîner nullité, cette nullité n'a pas lieu de plein droit, elle est seulement relative, et les Tribunaux peuvent l'admettre, ou non, selon les circonstances qu'ils ont pouvoir d'apprécier. Ils ne l'admettront pas facilement,

Il ne résulte pas de cette omission que l'on ait affecté d'extinction de la tutelle un parent qui prétendrait y avoir autant de droit, ou même plus de droit que celui auquel elle a été déferrée en l'absence du premier, et même hors sa connaissance, surtout si celui qui se plaint ne fait pas voir que les mineurs, dont l'intérêt seul doit guider, éprouvent aucun préjudice de cette tutelle. (1) C'est là la première règle que les juges ont à suivre. L'on peut encore remarquer que, quand même l'Intimé aurait été appelé à l'assemblée de Montréal, que cette assemblée, où le Juge aurait proposé de lui conférer la tutelle, il aurait pu néanmoins, dans les circonstances, à raison de sa résidence en dehors des limites de cette juridiction, prétendre être exempt de l'accépter, tandis que l'Appelant n'aurait pas pu faire valoir cette exemption pour lui-même, et que le juge aurait même pu le forcer d'accepter la tutelle. Une autre raison encore de préférer l'Appelant à l'Intimé, c'est qu'il demeure dans la paroisse du domicile des mineurs, et de la situation de leurs biens. "C'est, dit Lacombe, vbo. Tutelle, Seot. 4, No. 4, p. 580, une jurisprudence certaine que les tuteurs doivent être pris dans le ressort du bailliage où les biens des mineurs sont situés, *pour éviter aux frais de voyage.*" Cette règle, il est vrai, ne saurait être absolue ; le Juge peut toujours apprécier les circonstances. De plus, il a été admis, à l'audience, que l'Intimé est veuf. Les deux jeunes enfants ne trouveraient donc pas chez lui une ayeule pour leur tenir lieu de mère, tandis qu'ils ont l'avantage d'avoir les soins de leur ayeule maternelle chez l'Appelant.

Toutes ces raisons doivent porter à dire que la dation de la tutelle à l'Appelant ne comporte aucune injustice pour les mineurs dont les intérêts, sous tous rapports, se trouvent bien servis par cette tutelle, et que l'Intimé, en autant qu'il

(1) Dallos, année 1837, partie 2, p. 8, sur appel, arrêt du 13 oct. 1836 :—Idem, année 1838, partie 1, p. 163, arrêt de la Cour de Cassation du 3 avril, 1838 :—Idem, année 1839, partie 2, p. 96, arrêt de la Cour d'Angers, du 1er février 1839.

peut y être personnellement intéressé, n'a, dans les circonsances, aucune raison de se plaindre, puisqu'il n'en a pas été exclu pour nommer, à sa place, un parent plus éloigné en degré, ou moins qualifié ou compétent à remplir la charge. Le juge aurait pu, il est vrai, enjoindre à l'Appelant de notifier l'Intimé d'assister à l'assemblée de famille. Mais "autre chose est de régler la forme d'une élection à faire, autre chose est de prononcer sur la validité ou nullité d'une élection faite. Au premier cas, on ne risque rien d'employer quelques précautions surabondantes ; au second l'omission d'une forme qui n'est prescrite expressément par aucune loi ne peut pas nuire." (1) Au reste, l'Intimé a d'autant moins raison de se plaindre qu'il n'a mis aucune diligence à faire homologuer l'avis de parents qui a précédé sa tutelle, et qu'il n'a pris aucune démarche pour faire inventaire, tandis que l'Appelant s'est empressé de remplir ce devoir.

Aujourd'hui même en France, où une disposition expresse du Code Napoléon (art. 407, c. civ.) porte que "le conseil de famille sera composé, non compris le juge de Paix, de six parents ou alliés, pris, tant dans la commune où la tutelle sera ouverte, que dans la distance de deux myriamètres, moitié du côté paternel, moitié du côté maternel, et en suivant l'ordre de proximité dans chaque ligne" et que "le parent sera préféré à l'allié du même degré, et parmi les parents de même degré, le plus âgé à celui qui le sera le moins," l'on décide, et la jurisprudence paraît fixée sur ce point, que la contravention de cette disposition n'entraîne pas, *de plein droit*, la nullité de la tutelle. (2)

Enfin, comme il est de principe que "le juge de l'action est en même temps le juge de l'exception," la Cour Supérieure n'aurait point dû s'abstenir, comme elle l'a fait,

(1) 17. Guyot, Rep. vbo. Tutelle, p. 318.

(2) Voir les arrêts déjà cités du Recueil de Dalloz.

de prononcer sur la validité ou la nullité de la tutelle déferée à l'Intimé. (1)

Tout considéré, je suis d'opinion que l'on doit maintenir la tutelle de Beaudet ; déclarer nulle celle de l'Intimé, et par conséquent, infirmer le jugement de la cour de première instance.

Il convient peut-être de remarquer qu'un autre moyen de nullité, invoqué par l'Appelant contre la tutelle déferée à l'Intimé, n'était nullement fondé, savoir : le défaut d'autorisation préalable du juge des Trois-Rivières pour convoquer l'assemblée de parents ; puisqu'en vertu d'un acte de la Législature passé en 1851, ch. 58, le Notaire peut, "sans l'autorité formelle d'un juge," convoquer cette assemblée.

La Cour, etc., 1o. Considérant que la tutelle est dative dans le Bas-Canada ; qu'elle est uniquement déferée par le décret du juge, homologatif de l'avis de parents et amis préalablement recueilli en pareil cas, puisque c'est le juge qui nomme le tuteur, et non les parents et amis dont l'assemblée ne constitue qu'un moyen d'enquête, et dont l'avis ne peut servir que de motif pour le juge, celui-ci n'étant pas obligé de nommer la personne indiquée dans cet avis.

2o. Considérant que deux tutelles ne peuvent pas légalement subsister en même temps ; que l'une de ces tutelles est nécessairement nulle, et que la tutelle ainsi frappée de nullité ne peut être que celle qui n'a pas en sa faveur l'antériorité du décret du juge, tandis que celle qui a pour elle

(1) 6. Chauveau sur Carré, *Les lois de la Procédure Civile*, 3^e Edition, p. 479. Question 2990. "Quelle serait donc, dans la même espèce, (savoir, lorsque le mineur se trouve avoir deux tuteurs nommés devant deux Juges de Paix d'arrondissements différents) la voie à prendre pour faire décider quel sera celui des deux tuteurs qui devra gérer en définitive ?

" La marche naturelle est que le tuteur qui entend conserver la tutelle assigne l'autre tuteur devant le Tribunal de son domicile pour lui être fait défense de prendre cette qualité, et de s'immiscer dans l'administration. Celui-ci opposera la nomination qui le nomme ; et alors s'engagera la question de validité des titres respectifs, sur laquelle le tribunal sera compétent pour prononcer puisqu'il est de principe que le Juge de l'action est en même temps le Juge de l'exception."—12. Dallos, vbo. Tutelle, ch. 2, Sect. 5 :—Arrêt de la Cour de Rennes du 31 août 1818 :—Dallos, année 1826, 1^{re} partie, pp. 14, 20 et 21, arrêt de la Cour de Cassation du 18 juillet 1823. Henry vs. Moreau Saint-Rémy.

cette antériorité, si, sous tous autres rapports elle a été régulièrement conférée, est la seule qui, en pareil cas, doit subsister, lorsque l'intérêt des mineurs n'exige pas qu'il en soit ordonné autrement.

3o. Considérant que l'omission d'appeler à l'assemblée des parents et amis des mineurs, l'un des plus proches parents de ces mineurs, tel que, dans la présente espèce, l'Intimé, leur ayeul paternel, n'entraîne pas, de plein droit, la nullité de la tutelle désérée par le juge, quand même ce proche parent serait domicilié dans les limites du district où l'assemblée aurait eu lieu, et quand même ce fait aurait été porté à la connaissance personnelle du juge, si ce dernier, dans l'exercice du pouvoir discrétionnaire, que la loi lui donne, n'a pas jugé à propos, avant de rendre son décret homologatif, d'ordonner que ce proche parent fût mis en demeure de se présenter à l'assemblée ; que la loi et la jurisprudence du pays laissent aux Tribunaux à apprécier les circonstances ; et que s'il n'en résulte aucun préjudice pour les mineurs dont les intérêts, avant tout, doivent être consultés et guidés en pareille matière, il n'y a pas lieu d'annuller la tutelle, surtout lorsque, comme dans l'espèce actuelle, la tutelle désérée à l'Appelant a été désérée à un parent des mineurs au même degré que celui qui, faute d'avoir été appelé à l'assemblée, demande la nullité de cette tutelle sans démontrer en aucune manière que dans les circonstances, il y avait plus de droit que l'Appelant lui-même.

4o. Considérant que le dit William Oscar Dunn, le père des enfants mineurs dont il s'agit, nés de son mariage avec feu Marie-Anne-Mathilde Beaudet, avait, lors de ce mariage, et a toujours eu depuis cette époque, jusqu'à sa mort, arrivée en décembre 1851, son domicile dans la Paroisse de St. Ignace du Côteau du Lac, district de Montréal ; que c'est dans la juridiction de ce district, comme y ayant le domicile susdit, qu'après le décès de sa femme, arrivé en juin 1851, le dit William Oscar Dunn fut lui-même, le 20 octobre suivant, nommé tuteur à ses dits enfants mineurs,

et l'Appelant, leur subrogé-tuteur ; que les dits enfants n'étaient alors âgés, l'un que de sept ans, et l'autre de cinq ans ; qu'en pareil cas le dernier domicile du père continuait d'être celui de ses enfants mineurs, le domicile des mineurs Dunn, lors de la tutelle, ainsi déférée à l'Appelant, leur ayeul maternel, était dans la dite paroisse de St. Ignace du Côteau du Lac.

50. Considérant que si l'Intimé est parent des dits mineurs, au même degré que l'Appelant, le premier étant leur ayeul paternel, et le second leur ayeul maternel, l'Intimé qui à son domicile dans le district des Trois-Rivières, èt, par conséquent, hors de la jurisdicition de Montréal, aurait pu par cela même, dans les circonstances, prétendre être exempt d'accepter la tutelle, si l'assemblée, ou le Juge de Montréal, avait voulu la lui donner, tandis que l'Appelant, qui a son domicile dans la dite paroisse de St. Ignace du Côteau du Lac, n'aurait pas eu la même exemption à faire valoir, et aurait pu être forcé d'accepter la tutelle ; que de plus, les biens des mineurs délaissés par leur père à son décès, étant dans la susdite paroisse, l'administration de ces biens par l'Intimé, aurait été, dans les circonstances, à raison des frais de voyage, plus dispendieux que l'administration de ces mêmes biens par l'Appelant qui demeure sur les lieux.

60. Considérant que s'il est vrai que l'avis des parents et amis, pris dans le district des Trois-Rivières, lequel a donné lieu à la tutelle invoquée par l'Intimé est antérieur en date à celui qui a été recueilli dans la Jurisdiction de Montréal, et qui a donné lieu à la Tutelle déférée à l'Appelant, il n'en est pas néanmoins de même des décrets des juges, homologatifs de ces délibérations respectives, puisque le décret du juge de Montréal qui a déféré la tutelle à l'Appelant est antérieur en date à celui du juge des Trois-Rivières qui a homologué l'avis de parents et amis pris dans ce dernier district ; que, par conséquent, en supposant qu'il aurait pu être procédé valablement à la tutelle des mineurs

Dunn, dans l'un ou l'autre des deux districts, celle qui a eu lieu dans la juridiction des Trois-Rivières n'en serait pas moins, dans les circonstances, nulle, et les procédés sur lesquels elle est fondée, n'en devraient pas moins être regardés comme non avenus puisque des deux tutelles, dont l'une seule peut subsister, celle des Trois-Rivières n'a pas en sa faveur l'antériorité du décret du juge qui seul confère la tutelle.

7o. Considérant donc, d'une part, que la tutelle invoquée par l'Intimé est nulle, et doit être déclarée telle ; de l'autre part, qu'il n'y a pas lieu, dans les circonstances, d'annuler celle déférée à l'Appelant ; que par la requête de l'Intimé présentée à la Cour Supérieure siégeant à Montréal, à l'effet de faire prononcer la nullité de la tutelle déférée à l'Appelant, et par les réponses de ce dernier, soutenant la validité de sa tutelle, et concluant à la nullité de la tutelle de son adversaire, les parties ont engagé la question de validité de leurs titres respectifs, sur laquelle la dite Cour Supérieure, siégeant à Montréal, était compétente pour prononcer, puisqu'il est de principe que le juge de l'action est en même temps le juge de l'exception.

8o. Considérant, par conséquent, que la dite Cour Supérieure, en prononçant par son jugement du trente et unième jour de Décembre, mil huit cent cinquante trois, la nullité de la dite tutelle, déférée à l'Appelant, a mal jugé ; que de plus elle n'aurait pas dû s'abstenir, comme elle l'a fait, de prononcer sur les conclusions de l'Appelant, demandant que la dite tutelle invoquée par l'Intimé, fût déclarée nulle :— Infirme le susdit jugement ; et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déclare la dite tutelle déférée à l'Appelant bonne et valable, laquelle doit avoir plein et entier effet, et déboute l'Intimé des conclusions par lui prises pour en faire prononcer la nullité ; et de plus, déclare la dite tutelle invoquée par l'Intimé nulle et de nul effet à toutes fins quelconques ; le tout avec dépens contre l'Intimé en faveur de l'Appelant tant

sur l'instance en la dite Cour Supérieure que sur le présent appel.

CHERRIER et DORION, pour l'Appelant.

E. DAVID, }
R. MACKAY, } pour l'Intimé.

**BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.**

Présents : SIR L. H. LAFONTAINE, Juge en Chef, AYLWIN,
DUVAL et CARON Juges.

MURRAY..... *Appelant.*

et

MACPHERSON..... *Intimé*

Jugé :—Que l'obligation par une partie, en un partage, de laisser un chemin sur sa portion de terre, et d'y faire et macadamiser une voie de trente pieds de largeur, est une servitude et charge réelle, pour l'exécution de laquelle la partie, en faveur de qui elle est stipulée, peut se pourvoir par opposition afin de charge sur décret forcé.

Held :—That the undertaking of a party in a deed of partition, to suffer a road-way upon his portion of land, and to make and macadamise the same to the extent of thirty feet in width, is a servitude et charge réelle for the preservation of which the party in whose favor it is stipulated, hath a right to make an opposition *afin de charge* upon a judicial sale of the property.

Jugement rendu le 2 juillet 1855.

L'Intimé et un nommé Patterson avaient acquis conjointement une terre près de la cité de Montréal. Par un acte de partage reçu devant notaires, cette propriété fut partagée entre eux, et comme la profondeur échut à Macpherson, Patterson s'obligea par l'acte " de faire à ses propres frais et dépens, dans le cours de l'été (alors) courant, un chemin des numéros 29 et 30 (afférant à Macpherson) jusqu'au chemin de la Reine, de soixante pieds de largeur, dont trente pieds au centre seront en gravois dans toute la longueur d'icelui, pour l'usage du dit D. L. Macpherson et ses représentans, et ce au centre ou au côté Est de la partie de la dite terre échue au dit Patterson, jusqu'au dit chemin de la Reine, et jusqu'à ce que ce chemin soit fini le dit David Macpherson aura l'usage du chemin actuel

“ qui se trouve sur la partie de la dite terre, en dernier lieu
mentionnée, en commun avec le dit Patterson.

Quelque tems après Macpherson vendit sa part à Murray,
l'Appelant, avec tous les droits, priviléges et servitudes en
vertu de l'acte de partage ci-dessus mentionné.

Macpherson ayant obtenu jugement contre Patterson, fit
subséquemment saisir la part échue à ce dernier dans la dite
terre, sans aucune charge ni réserve, et Murray s'opposa à
la vente à moins que ce ne fut à la charge de fournir et faire
le chemin en question, ses conclusians sont dans les termes
suivants.

“ Wherefore, the said Opposant prays, that his present opposition may be declared good and valid, and that the said Opposant be kept and maintained in all his said rights, and further prays *mainlevée* of the said seizure, so made of the said immoveable property, and that the sheriff of this District may be ordered to suspend all further proceedings under the said writ, in so far as respects the said immoveable property, in manner as aforesaid, until the further order of the said court, in the premises, and that by such order or judgment, to intervene in the premises, it be ordered and adjudged that the said immoveable property, so seized and taken in execution in this cause, be not sold, except subject to the present opposition, and among other things, liable and charged and affected with, in favor of the said Opposant, a road and right of way, over and in a road leading from said lots No. 29 and 30, on said plan, to the Queen's highway, sixty feet wide, whereof thirty feet wide in the centre to be gravelled along the entire length, for the use of the Opposant and his representatives, at the centre or east side of the said immoveable property, seized in this cause; and that the Defendant, or others interested, be bound, within eight days after the rendering of said judgment, on the present opposition, to make option whether the said road shall be made at the centre or east side of the said immoveable property herein seized, and in default of such option, that the said

road be and be made on the east side of said immoveable property of the Defendant; and also chargeable and subject to and with the making of said road by the Defendant, and the proprietor or proprietors of said immoveable property, so seized in this cause, and liable and subject to, and affected with, in favor of the Opposant, the use of the present road, to wit, the said old road which is on the said immoveable property so seized in this cause, in common with the proprietor, or whomsoever will be the proprietor thereof, until the above mentioned road, sixty feet wide, shall have been made and completed."

Par une exception Macpherson contesta l'opposition, alléguant que l'obligation était purement personnelle, et ne pouvait être considérée comme servitude réelle.

La cour supérieure à Montréal rendit, le 3 mai 1853, le jugement suivant :

" The court &c. considering that in and by the said deed of partition, it is among other things covenanted and agreed, " by and between the said Plaintiff and Defendant, parties thereto, then and there co-proprietors par indivis of the immoveable property therein fully described, that a certain " road should, within the time fixed therein, be made by " the said Defendant, on the portion of the said immoveable " property or farm to him allotted, in and by the said par- " tition, for the use of the said Plaintiff, and that until the " said road should be made and finished, the said Plaintiff " should have the use of an old road, to wit, the then exis- " ting road, which is, and was then and there, on the portion " of the said farm, of and belonging to the Defendant, sei- " zed and taken in execution, on the said Defendant, and " that the said existing road, should by the Plaintiff, be used " in common with the said Defendant ; considering, also, " the right settled by the parties, under, and in virtue of the " said partition, in so far as the then existing road is con- " cerned, is a *droit réel*, in the nature of a servitude, atta- " ching to the said land, and belonging to the said De-

" defendant, to and in favor of the said Plaintiff, and that the
 " Opposant is in all the rights and privileges of the Plaintiff,
 " in relation to the said road, in so far as the said road is
 " concerned, maintains the said opposition *afin de charge* ;
 " and further the Court doth adjudge and declare, that the
 " said opposition, whereby the said Opposant prays that the
 " said immoveable or farm seized and taken in execution,
 " by the Sheriff in this cause, be declared liable and subject
 " to, and charged and affected in favor of the said Opposant,
 " with the use of the road existing on the land of the De-
 " fendant, at the time of the execution of the said partition,
 " in common with the Opposant, or whomsoever shall be,
 " or become the proprietor of the said land hereafter, until
 " the new road agreed and stipulated upon, by and between
 " the said Plaintiff and Defendant, in and by the said par-
 " tition mentioned, shall have been made, in the manner
 " stipulated and agreed upon by the said parties, the whole
 " with costs of the present contestation, and lastly, the
 " court doth dismiss the remainder of the conclusions of the
 " said opposition.

L'Opposant appela de ce jugement, se fondant sur ce qu'aucune forme d'expression n'est requise pour constituer une servitude, et qu'il suffit d'une intention bien marquée de grever un fonds en faveur d'un autre pour constituer une servitude, ce qui existe dans le cas présent. (1)

L'Intimé de son côté soutenait qu'il ne résultait aucune servitude de la convention en question, dont peut être grevé le terrain de Patterson, mais seulement une obligation personnelle ; et qu'il n'y avait servitude qu'à l'égard de l'ancien chemin, tel que jugé par la cour de première instance. (2)

(1) Autorités de l'Appelant :—1 Pardessus, Servitudes, p. 25, No. 10, p. 28, No. 11 :—3 Toullier, pp. 241, 2, 3, No. 382 :—2 Grande Coutume de Ferrière, p. 1474, No. 7 :—*Idem*, 1479, No. 15 :—Lalaure, Servitudes, p. 53 :—Pothier, Cour. d'Orléans, pp. 89, 90 :—1 Delvincourt, p. 419, nos. 4 et 5 :—2 Heinocius, Traduction de Berthelot, p. 112, en note.

(2) Autorités citées par l'Intimé sur la Nature de l'Obligation :—Guyot, Report vbo. Servitude, p. 249 :—Lalaure, Servitudes, p. 9 :—1 Pardessus, Servitudes, pp. 19, 26, 26 :—3 Toullier, nos. 377, 378, 379 et 380 :—Doute en faveur de la Libération, vide 1, Pardessus, Servitudes, p. 38 :—Titre créatif seul à examiner : 2 Pardessus, Servitudes, p. 50.

Sir L. H. LAFONTAINE, Br. ayant exposé les faits de la cause ajouta : " Tant que Macpherson et Patterson ont posé sédé *par indivis* la terre qu'ils avaient acquise de Leduc, " le chemin ou sentier qui, dans le jugement de la cour de première instance, est appelé " *le chemin existant,* " ne constituait pas, ne pouvait pas même constituer, une servitude. Un propriétaire, né peut pas avoir une servitude sur son propre fonds ; il est de l'essence de la servitude qu'elle ait pour objet le fonds d'autrui. Ainsi le sentier en question était confondu dans la pleine propriété que tous deux avaient alors de la terre.

" La stipulation relative à un chemin, insérée dans l'acte de partage qu'ils ont fait de cette terre, a eu l'effet d'établir, au profit de Macpherson, une servitude sur la portion de la dite terre, tombée au lot de Patterson. L'objet principal de cette stipulation est un chemin à faire, de 60 pieds de large, au moyen duquel Macpherson espérait rendre son héritage plus précieux, et non le sentier en question qui, évidemment, ne devait servir de passage à Macpherson que temporairement, c'est-à-dire en attendant la confection du chemin de 60 pieds, qui devait lui fournir un passage permanent, et être fait dans un temps peu éloigné.

" S'il y a servitude, ainsi que les premiers juges l'ont reconnu, quant au sentier, cette servitude n'a pu être établie pour ce sentier-là même que par la stipulation dont il s'agit. Or, ce passage temporaire que le sentier doit fournir, n'étant pas l'objet principal de la convention des parties, comment peut-on soutenir qu'il forme une servitude, sans que le chemin de 60 pieds, objet principal de cette même convention, puisse en former une également ? On ne saurait faire aucune distinction, à moins de s'expliquer à tomber dans l'absurdité de prétendre, que le sentier en question, formait une servitude avant l'acte de par-

"tage, et que cet acte n'a pas eu l'effet d'en créer une autre." (1)

Le jugement en appel est comme suit :

The court &c ; 1 Considering that under deed of sale of the 6th December 1845, from one Leduc, and wife, and passed before Belle and Colleau, Notaries, the said David Lewis Macpherson and James Patterson have become proprietors of a certain Farm therein described, and, as such, have been in possession of the same, *par indivis*, until the execution of the *acte de partage* hereinafter mentioned ; 2 Considering that by and in virtue of the said *acte de partage*, passed before the same Notaries on the 5th June 1846, a certain portion of the said farm (being the parcel of land seized in this cause) was allotted and fell to the share of the said James Patterson, and the remaining portion to the said David Lewis Macpherson ; 3 Considering that the said *acte de partage*, contains a certain stipulation to the following effect, viz :

- “ That the said James Patterson, shall also be bound, and doth hereby promise, bind and oblige himself to make, at his own costs and expense, in the course of the present summer, a road leading from lot number twenty nine and thirty, aforementioned, that is to say, from the portion of the said farm, so allotted to the said Macpherson to the Queen's highway, sixty feet wide, whereof thirty feet in the centre, shall be gravelled along the entire length, for the use of the said David Lewis Macpherson and representatives, at the centre or east side of his, the said James Patterson's portion of said Farm, as far as the road or Queen's highway ; and until the same shall be finished, the said David Lewis Macpherson, shall have the use of the present road, which is on the last mention-

(1) 16. Rep. de Jurisp., vbo. Servitude, Sect. 1, p. 249, 250, Sect. 11. p. 260, Sect. 16, 265, Sect. 27, p. 305 :—1. Pardessus, des Servitudes, Edit. de 1838, No. 11, p. 26 et 27, No. 9, p. 25. et p. 158.

" ed portion of said Farm, in common with the said James
" Patterson. "

4. Considering that the right settled by the parties, by and in virtue of the aforesaid stipulation, is a *droit réel*, in the nature of a *servitude* attaching to the land so seized, to and in favor of the said Macpherson and his representatives, in the possession of his aforesaid portion of the said Farm ; not only in so far as what is described as the present or existing road is concerned, but also in so far as regards the said road, of sixty feet wide to be made as aforesaid, and the more so as the latter road is the principal object of the said stipulation and not the other.

5. Considering that the said William Murray, under the deed of sale of 16th March 1848, is in all the rights and privileges of the said Lewis Macpherson, in relation to the said *servitude*, as well as with regard to one of the said roads as to the other ;

6. Considering, therefore, that there is error in the Judgment of the Court below, by which the said *servitude* is not recognized or admitted, as to the said road of sixty feet wide to be made as aforesaid; the conclusions of the said William Murray, in that respect, being dismissed.;

It is considered and adjudged by the court, now here, that the said Judgment; to wit, the Judgment rendered in this cause, by the superior court at Montreal, on the 3rd May 1853, be and the same is hereby reversed, annulled and set aside ; and the court here, proceeding to render the Judgment which the court below ought to have rendered, doth maintain the opposition *afin de charge* made and filed by the said William Murray, and it is therefore ordered and adjudged that the said parcel of land so seized and taken in execution in this cause, be not sold, except subject to and charged and affected with the said servitude as established by the said *acte de partage*, in favor of the said

William Murray, and his representatives in the possession of his aforesaid portion of the said farm, and therefore chargeable with and subject to, 1o. the making by the *adjudicataire*, or *adjudicataires* of the said parcel of land, or his, or their representatives in the possession of the same, at his or their own cost and expense, a road leading as aforesaid, from the said lots number twenty nine and thirty, aforementioned of the said William Murray's portion of the said farm, to the Queen's highway, sixty feet wide, whereof thirty feet in the centre, shall be gravelled along the entire length, for the use of the said William Murray, and his representatives aforesaid, at the centre or east side of the said parcel of land so seized and taken in execution, as far as the road or Queen's highway, and, 2o. in the meantime and until the same be made and finished, subject also to the use, by the said William Murray, and his representatives aforesaid, of the said present or existing road which is, as aforesaid, on the said parcel of land so seized, in common with the said *adjudicataire* or *adjudicataires*, his or their representatives in the possession of the same ; with costs, as well in the court below as in this court, against the said Respondent ; and lastly it is ordered that the record be remitted.

Cross et BANCROFT, pour l'Appelant,
Rose et MONK, pour l'Intimé.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : BOWEN, Juge-en-Chef, MORIN et MEREDITH, Juges.

No. 553, { AYLWIN et al. *Demandeurs.*
 vs.
 } ALLSOPP, et al. *Défendeurs.*

Jugé :—Qu'un donataire, obligé de payer les dettes du donateur, peut être condamné à payer le montant d'un jugement rendu contre la succession vacante du donateur, postérieurement à la passation de la donation, sur la simple production de tel jugement, et sans qu'il soit nécessaire de prouver que la dette existait avant la passation de la donation, autrement que par l'énoncé du jugement. *Contre* :—MEREDITH, Juge, est d'opinion que la dette qui est l'objet du jugement, n'ayant pas une date certaine, et ne paraissant pas avoir eu son existence avant la donation, le donataire n'en est pas tenu, et que l'action doit être déboutée.

Held :—That a donee, bound to pay the debts of the donor, may be condemned to pay the amount of a judgment rendered against the vacant estate of the donor, posterior in date to the passing of the donation, upon the mere production of such judgment, and without it be necessary to prove that the debt existed prior to the passing of the donation, otherwise than by what is stated in such judgment. *Contre* :—MEREDITH, Justice, is of opinion that the debt for which the judgment has been rendered, having no date certain, and there being no proof of its existence, prior to the passing of the donation, the donor is not liable, and the action ought to be dismissed. (1)

Jugement rendu le 26^e jour de mai 1855.

George Waters Allsopp, acquit de son père, pour lui et ses frères et sœurs, les seigneuries de Jacques-Cartier et d'Auteuil, par acte de vente en date du 7 juin 1797, devant Planté, Notaire.

James Allsopp, l'un des acquéreurs, fut absent du pays pendant un grand nombre d'années,—jusque vers l'année 1832.—Durant le temps de son absence, George Waters Allsopp eut la gestion de la part de seigneurie de son frère, qui, à son retour au pays, lui demanda une reddition de compte et finit par intenter une action contre lui. Mais avant l'institution de cette action, savoir : le 21 septembre 1835, devant Bigué, Notaire, George Waters Allsopp avait fait donation aux Défendeurs de ses parts et portions dans les seigneuries Jacques-Cartier et d'Auteuil, ci-dessus mentionnées. Cette donation fut confirmée par le testament du donateur en date du 26 février 1838. Les donataires prirent

(1) Ce jugement a été porté devant la cour d'appel.

immédiatement possession des biens donnés. Cette donation était une donation particulière et non d'une universalité de biens.

L'action de James Alsopp, mentionnée plus haut, fut signifiée au donateur peu de jours après la passation de cette donation.—C'était une action en reddition de compte pour la gestion de la part de seigneurie en question, depuis 1805 à 1833. Le donateur contesta cette action, et le 28 septembre 1837, date de la mort de George Waters Allsopp, le procès n'était pas encore terminé. James Allsopp intenta alors une action en reprise d'instance contre les Défendeurs, comme légataires du dit George Waters Allsopp, et par un jugement en date du 20 juin 1838, les fit condamner à lui rendre compte. Ce jugement fut porté en appel et fut renversé le 1er avril 1840, sur le principe que les Défendeurs n'étaient les représentants du dit George Waters Allsopp qu'à titre particulier, et conséquemment n'étaient pas tenus de payer ses dettes.—Le legs porté au testament n'était rien autre chose, comme il est déjà dit, que la ratification de la donation.

James Allsopp fit alors nommer un curateur à la succession vacante de George Waters Allsopp, renouvella son action en reddition de compte contre ce curateur, et le fit condamner à rendre compte, ainsi qu'il avait fait condamner antérieurement le dit George Waters Allsopp—et sur ce, le curateur produisit un compte qui fut débattu—puis référé à un praticien, George B. Faribault, écuyer, lequel fit un rapport, constatant que le reliquat de compte dû au dit James Allsopp, par la succession vacante, se montait à la somme de £435. 10 2*s*, avec intérêt du 1er octobre 1835, date de la première action, et enfin par un jugement final, rendu le 31 mars 1846, le dit James Allsopp obtint jugement contre Josiah Hunt, le curateur à la dite succession vacante, pour la somme dernièrement mentionnée, avec intérêt comme susdit.

Les Demandeurs étant aux droits du dit James Allsopp, intentèrent ensuite la présente action contre les Défendeurs pour le montant de ce jugement, alléguant qu'ils en étaient tenuis personnellement en vertu de la donation du 21 septembre 1835—se fondant sur la clause qui suit : “Enfin “ cette donation ainsi faite à la charge par les dits dona-“ taires, leurs hoirs et ayants cause, de payer, acquitter et “ décharger toutes les dettes, redevances et obligations du “ dit donneur—chacun d'eux payant et acquittant telle por-“ tion des dites dettes qui aura été contractée pour ce qui “ lui advient par la présente donation, l'intention du dit do-“ nomeur n'étant pas que l'un ou aucun des dits donataires, “ contribue au paiement des dettes qui auront été contractées “ pour les biens échus à l'un ou l'autre des autres par la “ dite présente donation.”

Pour bien comprendre cette clause, il faut savoir que cette donation était une donation de certains biens aux Défendeurs, et de certains autres biens à L. A. de St. Georges, et son épouse, et que, suivant les Défendeurs, cette clause obligeait ces deux catégories de donataires à payer, respectivement, seulement les dettes du donneur dues sur et par les biens donnés.

A cette action, les Défendeurs plaidèrent,—1o. Une défense en fait, devenue un moyen important dans la cause en conséquence de l'insuffisance de la preuve faite par les Demandeurs, et 2o. Une exception, alléguant en substance, entr'autres moyens, qu'ils n'étaient point tenus de payer la dette en question, attendu qu'elle n'était point une dette due par les biens à eux donnés, et que, d'ailleurs, ils avaient droit d'opposer la chose jugée, résultant du jugement rendu en appel le 1er avril 1840.

Les Défendeurs prétendaient que l'action des Demandeurs devaient être déboutée : 1o. Parceque les Demandeurs n'avaient point fait preuve que les items du compte qui avait

servi de base au jugement rendu le 31 mars 1846, contre Josiah Hunt, curateur à la dite succession vacante,—étaient dûs antérieurement au 21 septembre 1835, date de la donation.

2o. Parceque ni le rapport de G. B. Faribault, ni même la déclaration originale signifiée à George Waters Allsopp n'avaient été produits en la cause, et que les Demandeurs s'étaient contentés de produire des copies de jugements rendus dans diverses procédures, auxquels les Appelants n'étaient pas parties, et qui, par rapport à eux, ne faisaient aucune preuve, étant *res inter alios acta*, et n'ayant point de date certaine.

3o. Parceque la clause de la donation sus-mentionnée, limitait l'obligation des Demandeurs au paiement des dettes dues par les biens à eux donnés.

4o. Parceque cette clause, vague et générale, ne contenait pas une indication de paiement suffisante pour autoriser aucun créancier à porter l'action directe contre les donataires.

5o. Parceque les Défendeurs avaient droit d'invoquer la chose jugée en vertu du jugement du 1er avril 1840 ;—nonobstant que l'action eut été portée contre les Appelants dans cette première cause comme légataires, tandis qu'en la présente, ils étaient poursuivis comme donataire :—attendu que le legs en question n'était autre chose que la répétition et la ratification de la donation, et que le testament de feu George Waters Allsopp ne pouvait s'interpréter que conjointement avec la donation, et que, conséquemment, les obligations imposées aux Défendeurs en vertu de la donation avaient été soumises à l'examen de la cour d'appel.

La contestation étant liée entre les parties, et la preuve produite de part et d'autre, la majorité de la cour, composée de Bowen et Morin, Juges, fut d'opinion que l'action des Demandeurs était bien fondée, et qu'il était suffisamment établi que la dette était l'une de celles dont les Défen-

deurs étaient tenus aux termes de leur donation. Meredit, Juge, au contraire, était d'avis que l'action des Demandeurs devait être déboutée, parce qu'ils avaient failli de prouver que la dette qu'ils réclamaient, avait une date certaine antérieure à la donation.

Le jugement est motivé comme suit :

La Cour etc., considérant que les Demandeurs ont bien établi l'existence, à l'époque de la donation consentie le vingt et un septembre mil huit cent trente cinq, au Cap-Santé, devant Mtre Bigué, Notaire, et témoins, en faveur des Défendeurs actuels, et aussi de Robert Allsopp fils, écuyer, et de Dame Adélaïde Allsopp, épouse de Laurent A. de Saint-Georges, par George Waters Allsopp, écuyer, maintenant décédé, d'une dette au montant de quatre cent trente cinq livres, dix chelins, et deux deniers, due par le dit George Waters Allsopp à feu James Allsopp, écuyer, aussi maintenant décédé, et aux droits duquel est la Défenderesse comme sa légataire universelle, ainsi qu'il appert par le testament du dit James Allsopp, en date du vingt-six février mil huit cent trente huit, reçu au Cap-Santé devant Mtre. Bigué et son frère, Notaires, la dite dette portant intérêt à compter du premier octobre mil huit cent trente cinq, icelle dette, ainsi que l'intérêt, postérieurement constatés et établis par divers jugements et ordres mentionnés en la déclaration, et rendus par la cour du Banc du Roi et la cour du Banc de la Reine de ce district, et par la cour Provinciale d'appel, sur une poursuite intentée originairement par le dit James Allsopp contre le dit George Waters Allsopp, en reddition de compte pour l'administration et gestion de certaines affaires, et poursuivie après le décès du dit George Waters Allsopp contre Josiah Hunt, écuyer, curateur à sa succession, notamment par le jugement rendu par la dite cour du Banc de la Reine, le trente et un mars mil huit cent quarante six, condamnant le dit Josiah Hunt, en sa dite qualité, à payer au dit James Allsopp la somme de quatre cent trente cinq livres, dix chelins et deux deniers et demi, avec intérêt du premier octobre

mil huit cent trente cinq, et aux dépens, de la taxe desquels néanmoins il n'appert pas ; considérant que, par suite de la dite donation, que les Défendeurs ont acceptée pour leur part, et notamment par la charge imposée par le dit George Waters Allsopp, donateur, aux donataires en la dite donation, de payer, acquitter et décharger toutes les dettes, redevances et obligations du donateur, à laquelle charge les Défendeurs se sont soumis par le dit acte, les Défendeurs sont tenus aux termes du droit, et à ceux de la dite donation, au paiement de la dite somme de quatre cent trente cinq livres, dix chelins, et deux deniers et demi, ainsi que des intérêts accusés sur icelle, que là dite dette du dit George Waters Allsopp n'étant pas de celles qu'il avait, en l'acte de donation, réglé devoir être payées et acquittées par portions par chacun des donataires, suivant qu'elles auraient été contractées pour ce qui lui advenait, doit en loi être partagée sans solidité entre les quatre donataires sus-nommés, et qu'ainsi les Défendeurs en sont tenus pour moitié, savoir, chacun pour un quart ;—vu que la Demanderesse est bien et duelement en possession de son legs ;—vu aussi que l'exception de chose jugée ne s'applique pas, les Défendeurs n'ayant par le jugement rendu en la dite cour d'appel, mentionné aux exceptions des dits Défendeurs en la présente cause, été déchargés que d'une demande en reprise d'instance dirigée contre eux à titre universel dans la poursuite plus amplement ci-haut mentionnée ;—condamne les Défendeurs, pour les causes et considérations ci-dessus, à payer aux Demandeurs, deux cent dix-sept livres, quinze chelins et un denier courant, avec intérêt du premier octobre mil huit cent trente cinq jusqu'à parfait paiement, et les dépens de la présente action.

MEREDITH, Justice, dissentiente.—This action is founded on a deed of donation, by which the late George Waters Allsopp, gave certain real estate to the Defendants, and others, on condition of their paying certain debts. The Plaintiffs, Mr. and Mrs. Aylwin, (in the right

of the latter,) represent the late James Allsopp, a creditor as they allege, of George Waters Allsopp, at the date of the donation ; and the object of the present action is to compel the Defendants, as donees, to pay to the Plaintiffs as representing James Allsopp, the debt they allege to have been due to him, by George Waters Allsopp.

The chief difficulty that this case has presented to my mind, is one rather of fact than of law. The donees by the donation in question have, as I understand it, undertaken to pay the debts due by the donor *at the date of the donation*.

In order, under that covenant, to make the donees liable for any debt, it is incumbent upon the creditor suing to establish, that the debt sued for was actually due by the donor, *at the date of the donation* ; and the question of fact to which I have adverted, as having presented difficulty to my mind, is as to whether the Plaintiffs in this case, have proved by legal evidence, as against the Defendants, that the debt now claimed by them, was due on the 21st day of Sept. 1835, the date of the donation. The evidence offered on this point consists of several judgments, the most important of which are the interlocutory judgment of the 20th June, 1836, condemning George Waters Allsopp to render an account, and the final judgment of the 31st March, 1846, condemning the curator to the estate of George W. Allsopp, to pay the Plaintiffs, the sum of £435, the balance due to them on the account so rendered. One of these judgments was rendered about nine months, and the other nine years, after the making of the donation ; and the action in which they were rendered had not even been commenced at the date of that deed. Do then the judgments, thus recovered, legally establish, as against the Defendants in this cause, that the said sum of £435, was due by George W. Allsopp when the donation was made ? I think not ; because the judgments were rendered after the date of the donation, and in a suit in which the Defendants were not parties, and were not

represented in any way. It may be added that the judgments do not even expressly declare that the debt in question accrued at any particular time, and as I have already observed, the suit in which the judgments were obtained, was instituted after the making of the donation. It is plain that if George W. Allsopp had wished it, the judgment now sought to be enforced against the Defendants, might have been for £4000, or any greater sum, instead of £400; and it can hardly be contended, that a donor who has made a donation, subject to the payment of his debts, can afterwards increase, at his pleasure, the amount to be paid by the donee. It was for the Plaintiffs to have shown that these judgments, by themselves, and irrespectively of the evidence upon which they may have been rendered, are proof under the circumstances of the present case, against the Defendants; and I must say that I know of no principle of law, according to which I would be justified in giving to them that effect. If the judgment relied on were based upon evidence, which would be binding upon the Defendants in this cause, for instance, upon authentic instruments, bearing date before the donation, that evidence ought to have been produced in the present case. We cannot be certain, from the record as it is before us, what was the evidence in the former suit. The final judgment however says, that the curator to the estate of George W. Allsopp, in obedience to an order of the Court, produced an account, and from the nature of the case, it is probable, that the greater part of the liability of the estate of George W. Allsopp, was established by the account so rendered; and it is also probable, that according to the account, the liability of the Defendants would appear to have accrued before the date of the donation. But still, the account of the curator, although sufficient to support a judgment against the estate represented by him, would not be binding upon the present Defendants.

The account books, or other private papers of George W. Allsopp, even supposing them to bear date before the dona-

tion, would not prove their date as against the Defendants in this cause. It is true, that as regards the property which was the subject of the donation, the Defendants are the *ayants cause à titre particulier* of the donor, but as to acts *sous seing privé* made by him in favor of others, the Defendants, as *donataires particuliers*, are to be considered as *Tiers*; (1) and therefore, such acts *sous seing privé*, as I have already observed, are not, as to their date, proof against them.

(1) 5 Marcadé, p. 56, sur l'art. 1328 du Code Civ. On comprend facilement, et on a déjà dit incidemment, que notre article entend par tiers tous ceux qui ont traité avec la personne de laquelle émane l'acte, c'est-à-dire, *ses ayants cause à titre particulier*. Il est bien clair en effet, qu'il ne s'agit pas ici de tiers étrangers à cette personne, et que n'intéresse pas l'acte par elle souscrit; pour ceux-ci il est bien indifférent que l'acte ait ou n'ait pas date certaine, puisque cet acte ne produit aucun effet ni pour lui contre eux; c'est quant à eux *res inter alios acta, quia alii non nocet nec prodet*: pour que je puisse me prévaloir du défaut de date certaine d'un acte, et même pour qu'il y ait lieu de se demander si je puis ou non m'en prévaloir, il est bien évident qu'il faut que je sois de ceux contre lesquels cet acte peut produire son effet:—Troplong, Priv. et Hyp. No. 535 *in fine*, cite un arrêt de la Cour de Nancy, rendu sur ses conclusions le 14 Fév. 1848, qui a décidé que le donataire peut être admis à critiquer la date d'une obligation *sous seing privé*, *souscrite par le donneur*, et que cet acte ne peut lui être opposé comme ayant date certaine à son égard:—Troplong, Priv. et Hyp. No. 531 *in fine*, p. 359. Il faut donc reconnaître que, dans ces hypothèses, tous les auteurs cités ont pensé que l'on *se portait comme tiers* toutes les fois que l'on contestait la date d'un acte *sous seing privé* fait par celui dont on est l'*ayant-cause au profit d'un autre créancier*:—Merlin, Questions de Droit, vbo. Tiers, p. 9, 8o Ed. sur un arrêt du 11 Fév. 1822, dit que quoique le droit du donataire émane originaiement du donneur, signataire de la quittance, il n'est pas moins vrai que le même donataire est un tiers à l'égard du détenteur et même à l'égard du donneur, en ce qui concerne l'empêchement de celui-ci d'atteindre directement ni indirectement à l'irrévocabilité de la donation:—13 Duranton, p. 141, No. 136, is particularly clear on this point; as to Toullier's opinion being wrong vide 2 Troplong, Priv. et Hyp. No 529 et seq., at No. 531, the author says: Prouvons maintenant que l'opinion de M. Toullier est nouvelle et isolée quoiqu'il se fasse illusion au point de croire que c'est celle des jurisconsultes de tous les âges:—5 Marcadé, p. 56, speaking of the opinion of Toullier in this point calls it "une hérésie," at page 58, the same author says: "Il va sans dire au surplus que l'étrange erreur de Toullier, malgré ses longs efforts pour la faire triompher a toujours été repoussée par la jurisprudence, aussi bien que par les auteurs," and the author then cites six arrêts in support of his own views. See also 2 Grenier, p. 130, No. 354, —Merlin, Questions de Droit vbo. Tiers, and the numerous arrêts there cited.—

As to universal Donee being liable for those debts only which have a date certain, 2 Delvincourt, p. 276. Si la donation est universelle des biens présents, je pense que le donataire est tenu, même sans stipulation, de payer toutes les dettes existantes à l'époque de la donation jusqu'à concurrence des biens compris dans la donation, s'ils sont toutefois constatés par un inventaire, *as clientum est onus universitatis, mais à la charge par le créancier de prouver que sa créance est antérieure à la donation*, and at page 77 of the same volume, the author speaks of the obligation on the part of the donee to pay the debts of the donor, other than those having a *date certaine*, as causing the donation to be null. See also 2 Dalloz, Rép. vbo. Donation, No. 324. Ainsi le donataire universel des biens présents est tenu personnellement de toutes les dettes existantes, et ayant date certaine avant la donation:—8 Duranton, p. 543, No. 482. *in fine*. "Seulement le donataire ne serait obligé qu'à l'égard des dettes dont l'existence était certaine au jour de la donation."

I am aware that Toullier has contended that an *acte sous seing privé*, is proof, even as to its date, against the *ayants cause* (although *à titre particulier*) of the person by whom such act was made. (1) But this opinion of Toullier is shown to be opposed to the writings of the best authors before his time ; and is combated, and I think I may say proved to be as erroneous, as it is dangerous, by Merlin, (2) Grenier, (3) Marcadé, (4) and Troplong. (5) According then to my view the case stands thus : The Judgments rendered against the curator to the estate of George W. Allsopp, after the date of the donation, are not of themselves proof, as against the present Defendants, that the sum of money payable under these judgments, was due at the date of the donation ; and as in addition to the production of the judgments, the Plaintiffs have not shown, and probably could not have shown, that those judgments were rendered upon evidence, which could have bound the Defendants, as to the date of the debt in question, I am of opinion that the Plaintiffs have failed to show that which it was incumbent upon them to establish, namely : that the debt in question was actually due by George W. Allsopp, at the date of the donation.

There is another light in which this case may be viewed. A donee, *à titre particulier*, who has covenanted to pay the debts of the donor, would seem by his covenant, to be under the same obligations, in favour of the creditors of the donor, that a *donataire à titre universel* is subjected to, by operation of law, without any special covenant. (6)

Now the obligation of the *donataire universel* in the case supposed, is, in effect, to pay the debts of the donor "having an authentic date anterior to the donation," *ayant date certaine antérieure à la donation*; and no other.

(1) 8 Toullier, No 246, et seq.

(2) Merlin, Questions de Droit, vbo. Tiers, and numerous arrêts cited there.

(3) 2 Grenier, p. 130, No. 254.

(4) 5 Marcadé, p. 56.

(5) Troplong, Priv. et Hyp. Nos. 529, 531.

(6) Pothier, p. 417 :—7 Nouveau Den. vbo. Donation, p. 11, s. IV, No. 1.

Grenier, (1) speaking of a *donation universelle*, says :
 " le donataire est seulement tenu de celles qui sont établies
 " par des titres ayant une date certaine antérieure à la do-
 " nation." In support of this doctrine the author refers to
 two *arrêts*, of the latter of which he says : " Dans l'espèce
 " de ce dernier arrêt la dette n'avait pas date certaine, et
 " la Cour a jugé avec raison que le donataire ne repré-
 " sert pas à cet égard le donateur, qui devait être consi-
 " déré comme un tiers, et n'était pas assujetti au paye-
 " ment."

The debt sought to be recovered in the present case has
 not a *date certaine antérieure à la donation*, and, therefore,
 according to this view of the case, the Defendants, as donees,
 could not be made liable for it. (2). Upon the whole I am of
 opinion that the present action ought not to be maintained.

ANDREWS et CAMPBELL, pour les Demandeurs.

LELIÈVRE et ANGERS, pour les Défendeurs.

(1) Grenier, *Traité des Donations*, No. 17, p. 347 :—6 Duranton, p. 443 :—2 Dallos, Rep. vbo. *Donation*. No. 324 :—2 Delvincourt, pp. 216-7.

(2) *Vide also the considérants of the arrêt of the 11th February, 1822*, given by Merlin in his *Questions de droit*, and above referred to.

SUPERIOR COURT.—MONTREAL.

Before DAY, VANFELSON, and MONDELET, Justices.

No. 1232. *Ex parte*, HARVEY,..... Petitioner.

Held:—1o. That the lessee of a lot and water power near the Lachine Canal, and within the limits of the City of Montreal, from the Commissioners of Public Works under a lease for twenty one years, renewable for ever on the terms mentioned in the lease, has a *jus in re*, and is liable for City taxes and assessments, as proprietor of the leased property.

2o. That such lease is an alienation of the *domaine utile*, the Crown having only the *domaine directe*, and if made previous to the 14th and 15 Vict. chap. 128, is not affected by the powers conferred upon the Corporation of the City by the 92nd Section of that act.

Juge:—1o. Que le preneur à bail d'un emplacement et pouvoir d'eau, près le Canal Lachine, dans les limites de la Cité de Montréal, par bail des Commissaires des Travaux Publics, pour vingt et un ans, avec faculté de le renouveler à perpétuité aux conditions mentionnées dans le bail, acquiert un *jus in re*, et devient responsable, comme propriétaire du fonds baillé, des taxes et cotisations imposées par la Cité.

2o. Que tel bail emporte aliénation du domaine utile, la Couronne ne retenant que le domaine directe, et que si il est fait avant la passation de l'acte de la 14e et 15e Vict. chap. 128, ce bail n'est pas affecté par les pouvoirs conférés à la Corporation de la Cité par la 92e Section de cet acte.

Judgment rendered the 18th October 1854.

The judgment sought to be set aside was rendered in the Recorder's Court for the City of Montreal, on the 16th September 1854, condemning the Petitioner, as owner of certain stores and lots of land adjoining the Lachine Canal, within the City limits, to pay to the Corporation of the City the sum of £57 15, being the amount of four years assessments on the property, accrued and become due under a by-law of the Corporation, No. 185, referred to in the summons. The Petitioner, as appears by the proceedings in the Recorder's Court, pleaded an exception to the jurisdiction of the court, and a peremptory exception, and *Défense au fonds en fait*. The matters set forth in the exceptions, and relied on for setting aside the judgment, sufficiently appear from the remarks of the learned Judge who rendered the judgment in the *Superior Court*.

DAY, Justice:—This case comes before the court on a writ of certiorari, from the Recorder's Court in this City in which a judgment was rendered condemning the Defendant to pay

City Taxes and assessments on two hydraulic lots at the Lachine Canal, the one being vacant, and the other having buildings. The Defendant, by his exception in the court below, and at the hearing in this court, argued that the Recorder, in condemning him, had exceeded his jurisdiction ; in as much as the property did not vest in the Defendant, as proprietor, but was only held by him on a lease from the Commissioners of Public Works, which gave him no *jus in re* ; and the property, as belonging to the government, was exempt from taxation ; because, under the terms of the act of incorporation of the City itself, this particular property was exempt from all authority conferred upon the Corporation.

The first of the points urged by the Applicant in the case has already been decided by the Court in the case of Ira Gould, where the opinion was expressed that a case similar to the one under consideration was not a common *bail*, but partook of the nature of a *bail emphytéotique*, and, therefore, that the lessee was liable for the city taxes : that the Crown had no other right in the land than the *domaine directe*, and that the *domaine utile* was in the hands of the lessee ;—that, in consequence, the lessee was liable for all taxes ;—that the case was taken out of the operation of the 10th and 11th Vict. Cap. 31, which enacted that property belonging to Her Majesty should not be liable to taxation. The Court then held that the land under consideration did not belong to Her Majesty, but had become the property of the lessee, such was the opinion of the Court in the former case. The Court has gone over the case again, as the argument at the bar in the present case was close, able and correct, but the result of the new examination has not changed the former decision of the Court. The first point the Court now looks at, is the authority by which the Commissioners of the Board Works disposed of the property. By the 9th Vict. Cap. 37, Sect. 13, it is enacted “ That all lands, real “ property, streams, or water courses, acquired heretofore

"for the use of the Public Works vested in the Board of works, shall be vested in Her Majesty, her heirs and successors, to and for the purposes of the said works, and when the same, or any lands, real property, streams or water courses hereafter to be acquired, or any portion thereof, are not required for the said works, they may be disposed of under the sanction and authority of the Governor in Council, and the proceeds thereof accounted for as public monies; and that all such hydraulic powers as have been or may be hereafter created by the construction of any Public Works, or the expenditure of any public monies thereon, shall be vested in Her Majesty, her heirs and successors, and any portion thereof, not required for Public Works, may be disposed of under the sanction and authority of the Governor in Council by sale or lease, the proceeds of such sale or sales lease or leases to be accounted for as public monies." The term "*dispose*" here used, applies, in all instances in my recollection, to alienation, and never to the ordinary lease by landlord to tenant from year to year, and it must be taken as equivalent to a sale. The intention of the legislature evidently was to vest the Commissioners with the power of alienation. There are two leases in the case ; one made in September 1849, the other made in January 1851 ; the one of land on the canal, the other of land and water. The lease sets out that the Commissioners did "*grant, demise and lease*" to Harvey, for the period of 21 years, to be computed from 1846, the date at which he purchased the same at public auction. This bears out the view of the court that the contract in question is a sale. The deed then goes on to say that the lease is made for twenty-one years, and at the end of that period may be renewed, at the rate payable by other lessees for another period of twenty one years, and *so on for ever*, so that the property has for ever passed from the hands of the Crown, and can never come back again into its possession. It is further stipulated that buildings shall be erected by the lessee ; that all taxes imposed by the city shall be

paid by the lessees, and that the property shall be subject to all the regulations that the city authorities may impose. All this shows what the intention of the parties has been and the case is taken out of the ordinary class of cases. Under these circumstances the Court is compelled to adhere to its former view and has no hesitation in saying that these deeds cannot be considered as ordinary leases, but that they partake of and are clothed with the character of the *bail emphytéotique*, and are an alienation of the *domaine utile*, which places the lessee in the same position as the holder à *bail emphytéotique* or *bail à rente*.

This opinion is not alone formed on general principles, but is sustained by all the authors in an unqualified manner. Some call such a lease, *bail emphytéotique*, some *bail à rente*. (1) With the exception of a few authors referred to in Troplong, Louage, No. 25, there is no dissent from the proposition that the lease for a period over nine years is more than an ordinary lease.

Merlin, Repertoire, vbo. Bail, p. 4, No. 2, is very strong in his opinion against this view, unless the lease was à *perpétuité*, but admits that most authors are the other way of thinking. Troplong says: it is a question whether such a lease is a mere *droit de jouir*, or a title *translatif de propriété*. (2).

Under these circumstances the court entertains no doubt that the lease gives the lessee the property of the *domaine utile*, conveying to him a *jus in re*, and rendering him liable for taxes which the proprietor is bound to pay.

It was then contended for the Applicant that under the 14th and 15th Vict. chap. 128, Sect. 92, the land was taken

(1) Nouv. Den. vbo. Bail à Ferme, p. 28, No. 1, "Baux peuvent être au-dessous de neuf ans, mais ils ne peuvent excéder ce temps; autrement ils passent pour une aliénation."—Pothier, Louage, No. 27.—Ferrière, Dictionnaire de Droit, vbo. Bail:—Domat, p. 21:—Duplessis, Traité des Fiefs, art. 35, p. 60.

(2) 1. Troplong, pp. 125, 126:—Dallas, Dict. vbo. Louage Emphytéotique, Nos. 5, 38, 39, 40, 44, 54:—Idem, Supplément, Nos. 2, 9, 16.

out of the jurisdiction of the Corporation. The words are as follows: "Provided always, and be it enacted, that "nothing in this act shall extend, or be construed to extend, "to revoke, alter, abridge, or in any manner affect the powers "and authority now by law vested, or which may hereafter be "vested in the Master, Deputy-Master and Wardens of "the Trinity-House of Montreal, or in the Commissioners "appointed, or to be appointed, for the execution of any act "now in force, or hereafter to be in force, relating to the im- "provement and enlargement of the Harbor of Montreal, or "in the Commissioners appointed for making, superin- "tending, repairing and improving the Lachine Canal, nor "to the wharfs and slips erected, or to be erected, by the said "first mentioned Commissioners, nor to the wharfs and "grounds under the direction of the said last mentioned "Commissioners: Provided always, that the said Corpo- "ration of the City of Montreal shall have power, so often as "the same may be requisite, to open any drain leading "from the said City to the River St. Lawrence, to employ "the constabulary force of the said City in the maintenance "of peace and good order on the said wharfs, and to appoint "and designate stands or places of *rendez-vous* for carts and "carriages thereon."

It was contended that the proviso in this clause, giving certain powers to the Corporation, and specially referring to these powers, took all other powers away in respect of the properties put under the direction of the Commissioners of Public Works.

The court after giving this question, which was not raised in the former case, a good deal of attention are against the Applicant. In fact, the land in question was not at the time of the passing of this last act, under the power of the Commissioners, and in truth this question was decided in the first case. The act was passed after the making of the two leases, and, therefore, the 92d section, can not refer to them. The two leases are an alienation, and therefore the lands con-

veyed by them can not be affected by the act passed subsequently.

Rule to quash judgment discharged, and rule to quash *certiorari* made absolute.

HENRY STUART, for Applicant.

J. F. PELLETIER, for City Corporation.

Extract from printed lease :—

“ Which said Commissioners, in consideration of the rents
“ &c., do grant, demise and lease to the said party of the
“ second part, his heirs and assigns, all that certain lot of
“ ground being part of the property belonging to one of the
“ public works of the said Province, commonly called the
“ Lachine Canal, containing, &c., to have and to hold the
“ said lot with the easement and flow of surplus water, as
“ aforesaid, unto the said lessee, his executors and assigns
“ from the——day of March next, for and during the period
“ of twenty one years, renewable as hereinafter provided,
“ yeilding and paying therefor to the said Commissioners
“ and their successors in office, on behalf of Her Majesty,
“ her heirs and successors, the yearly rent of—————
“ currency.”

The lease contains various conditions, some of which are in effect as follows :—That if the rent be unpaid for thirty days, the Commissioners may stop the water ; and if unpaid for six months, or on breach of any of the conditions of the lease, the Commissioners may resume the leased premises as if the lease had never been executed.

No damage to be paid in case of temporary stoppage of water, or for repairs.

No building to be erected within twelve feet of the front of the dock wall ; all buildings “ to be subject in all respects “ to the Municipal by-laws and regulations of the locality “ in which it shall be situate.

" That all rates and taxes of watever description, that
" may be payable in respect of the lots and water power
" hereby leased, and of the buildings which may be erected
" thereon, shall be paid by the lessee, his executors, &c.,
" during the continuance of this lease."

At the expiration of the lease, the Commissioners " shall
" grant to the said lessee the said lot of ground, and flow
" or supply of *surplus* water for a second term of twenty
" one years, upon and subject to the same conditions, as here-
" in contained with the exception of the amount of yearly
" rent.....and that at the expiration of such second term,
" the said Commissioners shall grant a further lease of the
" said premises, for a third term of twenty one years, and
" so on for ever, subject to all the provisoos and conditions
" in the present lease contained, and to the determinniation of
" the amount of rent to be paid for each term of twenty one
" years, as is mentioned with respect to determining the
" rent to be paid during the second term herein mentioned."

SUPERIOR COURT.—QUEBEC.

Before BOWEN, C. J. and MEREDITH, Justices.

No. 1733. { FITZBACK, et al., Plaintiffs,
vs.
CHALIFOUR, Defendant.

Held:—That an affidavit for *saisie-arrêt* in which it is alleged,—“That deponent is credibly informed, hath every reason to believe, and doth verily in his soul and conscience believe, etc.” is sufficient. Jugé:—Qu’un affidavit pour *saisie-arrêt* dans lequel il est dit,—“Que le déposant est informé d’une manière croyable, à toute raison de croire, et croit vraiment en sa conscience,” etc., est suffisant.

Jugé :—Qu'un affidavit pour *scisez-arrête* dans lequel il est dit,—"Que le déposant est informé d'une manière croyable, à toute raison de croire, et croit vraiment en sa conscience," etc., est suffisant.

Judgment rendered the 1st day of September, 1855.

The case was submitted upon a motion to quash the writ of *saisie-arrest* issued in the cause, upon the ground, among others:—

That the affidavit upon which the writ of *saisie-arrest* is-
sued, contained no positive allegation that the Defendant
was "about to secrete, &c." but merely a belief that he
was about to do so.

BOWEN, Chief-Justice :—All the affidavits for writs of *saisie arrêt*, which have for many years past issued out of this Court, containing the form of words used in the affidavit in this case; have been held good and sufficient ; this form of words is expressly laid down by the Legislature in the affidavit given in the 9 Geo., IV Ch. 27, and whether this act is in force now or not, inasmuch as doubts have been entertained upon this point, the form of affidavit given in it must be considered as the intérpretation which the Legislature has put upon the act of the 27 Geo. III, Ch. 4.

The Court will, therefore, maintain this form of affidavit, and maintain the practice which has hitherto prevailed in Quebec in this particular. (1).

(1) 4. L. C. Rep. p. 49, *Shaw vs. McO'Connell*—5. L. C. Rep. p. 195, *Leing vs. Bresler*—*Wurtele vs. Price*, p. 216:—*Balle vs. Nelson*, 216:—*Maguire vs. Hartley*, p. 251.

JUDGMENT :—“ The Court seeing, &c., the motion that the *saisie-arrest* in this cause issued be set aside with costs, for the reasons set forth in the said motion ; considering that the reasons set forth in the said motion are insufficient to set aside the said writ of *saisie arret*, doth dismiss the said motion, with costs against the Defendant.

CASAUT and LANGLOIS, for Plaintiff,
TESSIER, U. J., for Defendant.

SUPERIOR COURT.—QUEBEC.

Before BOWEN, Chief-Judge, MEREDITH & MORIN, Justices.

No. 303. { DENIS, Plaintiff,
 } vs.
 { ST. HILAIRE, et al. Defendants.

Held :—That a seizing creditor is only entitled to be collocated, by privilege, upon the proceeds of a judicial sale, for the costs of an ordinary action by default settled at the sum of £4 9 0.

Jugé :—Qu'un créancier saisissant n'a droit d'être colloqué, par privilège, sur le produit d'une vente judiciaire, que pour les frais d'une action ordinaire, jugée par défaut, taxés à £4 9 0.

Judgment rendered the 19th September, 1855.

In this case the Plaintiff had brought an action of damages for a malicious prosecution, (an indictment for perjury,) against seven Defendants, whom the Plaintiff alleged to have combined together to subject him to this criminal prosecution. The Plaintiff also alleged that he had been acquitted by a *Petit Jury*.

The Defendants severed in their defence, and through the ministry of one Counsel raised seven different issues. The Plaintiff having failed to establish his demand, his action was dismissed, with costs to each of the Defendants, which were allowed to their Attorney, by way of *distraction de frais*. Seven Bills of costs were duly taxed against the Plaintiff, amounting altogether to the sum of £210.

Execution issued for the same, and the immovable property of the Plaintiff was brought to sale. Upon the pro-

ceeds of this sale the Attorney of the Defendants claimed to be paid, by privilege, for the whole amount of his costs, as being costs necessarily incurred to bring the Plaintiff's property to sale.

This question was raised by means of the following proceedings.

By a draft of Report of Distribution, the Prothonotary had collocated the Defendant's Attorney for the whole amount of his costs, by privilege ; and one Morency, a creditor, had contested this collocation, on the ground that the seizing creditor could not claim by privilege, a larger sum than would be necessary to obtain a judgment in an ordinary case by default.

After a hearing *en droit*, the Court maintained the contestation of Morency, and reduced the privileged costs of the Defendant's Attorney, the seizing creditor, to the sum of £4 9. The judgment is as follows :

' The Court having heard the parties, by their counsel respectively upon the contestation filed by the said Jacques Beaucher dit Morency, to the collocation of the said Jean Thomas Taschereau, for costs of action, mentioned in the report of distribution No. 1, in this cause filed ; Considering that the real estate of the Plaintiff could not have been sold under the authority of this court, unless a judgment had been recovered against him, and that the costs of recovering such a judgment in the ordinary course of law, would have amounted at least to the sum of four pounds, nine shillings, currency ; and considering that the said Jacques Beaucher dit Morency, and the other creditors of the Plaintiff, profit to the extent of the said sum of four pounds nine shillings, currency, by the costs incurred in this cause by the Defendants ; and, therefore, that the last mentioned costs, ought to be deemed privileged, to the extent of the said sum of four pounds nine shillings, but not to any greater extent. It is in consequence considered and adjudged that the said collocation, in favour

of the said Jean Thomas Taschereau be, and the same is hereby maintained to the extent of the said sum of four pounds nine shillings, and the said collocation in so far as it exceeds the said sum of four pounds nine shillings, is hereby overruled and set aside. And it is hereby ordered that the report of distribution in this cause be amended accordingly; and it is further ordered that the said parties pay their own costs, respectively. To which judgment the honorable Edward Bowen, Chief-Justice, dissented, declaring that he was of a contrary opinion.

GAUTHIER, pour le Demandeur,
TASCHEREAU, pour l'Opposant.

The dissent of Chief-Justice Bowen was merely as to the amount of privileged costs, which he thought ought to be larger.

In a previous case, No. 237, Gauthier *vs.* Blaicklock, a judgment was rendered the 9th April 1855, by Justices Bowen, Morin and Badgley granting to the Plaintiff's Attorney, the seizing creditor, a privilege for the whole amount of his costs of action, and also for the costs of an appeal.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 942.	MOODY,.....	<i>Plaintiff,</i>
	vs.	
	VINCENT, fils, <i>et al</i>	<i>Defendants,</i>

et

HUTCHINS,..... *Opposant.*

Held:—That the effects of Copartners sold under execution, are not liable to creditors of one of the copartners individually, until after payment of the partnership creditors.

Jugé:—Que les effets de sociétaires, vendus par autorité de justice, ne sont pas sujets au réclamations des créanciers de l'un des associés, avant que les créanciers de la société n'aient été payés.

Judgment rendered the 30th May, 1855.

In this cause certain monies were returned into court, and in the Report of *collocation* were stated to be levied from the

goods of the Defendants. The Defendants were Jean Baptiste Vincent, fils, Jean Marie Prud'homme and George Beaudry, the two last named being described as copartners, carrying on business under the firm of Prud'homme, Beaudry and Co. The Opposant, Hutchins, filed an opposition *afin de conserver* founded on two judgments obtained by him against Prud'homme individually, and alleged that the goods sold belonged in reality to Prud'homme ; that the alleged partnership was fraudulent and merely made to protect the property of Prud'homme. Hutchins was collated for a portion of the monies levied, and the report of collocation and the opposition of Hutchins were contested by the Defendants, Prud'homme and Beaudry, on the ground that no fraud or collusion existed as alleged by the Opposant.

DAY, Justice :—There is no sufficient evidence of the goods sold in this cause being the property of Prud'homme, one of the partners of the firm of Prud'homme, Beaudry and Co. By the return of the Sheriff it appears that the seizure was made at the place of business of the firm, and the court is of opinion that the property of the partnership is not liable to creditors of the partners, individually, until after payment of the debts of the firm. This jurisprudence was invariably followed in France. The opposition of Hutchins must be dismissed, and the report of collocation reformed.

The monies for which the Opposant, Hutchins was collated were distributed to the creditors of Prud'homme, Beaudry and Co. whose oppositions had been filed in the cause.

Rose and Monk, for Opposant,
Doutre and Daoust, for Contesting parties.

COUR SUPÉRIEURE.—QUÉBEC.

Presents ; MORIN et BADGLEY, Juges.

No. 1414. } RUSTON,..... *Demandeur,*
 } vs.
 } BLANCHARD,..... *Défendeur.*

Jugé :—1o. Que le vendeur qui stipule que l'acquéreur prendra ratification de titre avant de payer, est, par le fait de cette stipulation, partie à la procédure en ratification, et que, partant, l'acquéreur n'est pas tenu de l'appeler en garantie pour lui donner l'occasion de contester les réclamations.

2o. Que les longues contestations venues sur la surenchère faite au prix d'achat par un créancier opposant à l'encontre de la demande en ratification, et les délais intervenus sur des oppositions contestées, n'ont pas l'effet de décharger l'acquéreur du paiement des intérêts sur son prix d'achat, lesquels deviennent payables, après les quatre mois d'avis préalable à l'obtention du jugement de ratification écoutée, et lesquels intérêts il doit payer jusqu'au jour du dépôt judiciaire, quoiqu'à cette époque les contestations ne fussent pas encore terminées.

3o. Que l'omission de quelques-unes des formalités requises par le Statut Provincial 9e Geo. IV chap. 20 (statut des ratifications) pour parvenir à une surenchère du prix d'achat, n'entraîne pas la nullité de la procédure.

Held :—1o. That the vendor who covenants that the purchaser shall obtain a ratification of title before making payment, becomes, by reason of such covenant, a party to the proceeding for ratification, and that, consequently, the purchaser is not bound to call in the vendor en garantie, to give him an opportunity of contesting claims filed in the proceedings.

2o. That the lengthy contestations arising out of the overbid made to the price of sale by an opposing creditor to the proceeding for a ratification, and the delays consequent upon the contestations of oppositions, have not the effect of discharging the purchaser from the payment of interest upon the purchase money, which interest becomes payable after the lapse of the four months for giving the public notice necessary for obtaining letters of ratification, and which interest he is only bound to pay up to the day of the payment of the money into court, although at that period the contestations had not been disposed of.

3o. That the omission of some of the formalities required by the Provincial Statute of the 9th Geo. IV, cap. 20, to be admitted to overbid upon the price of sale, does not entail a nullity of the proceeding.

Jugement rendu le 19 Septembre, 1855.

La demande alléguait que le Demandeur avait acquis du Défendeur un certain immeuble pour £1000 courant, que le Demandeur s'obligeait de payer aussitôt qu'il aurait obtenu un jugement de ratification de titre, ce à quoi le Défendeur avait consenti ; qu'il avait obtenu ce Jugement ; que sur la demande en ratification de titre, la Société de Bâtisse de Québec, créancière hypothécaire du Défendeur, et Opposante à la demande de ratification, dans les quatre mois de la publication des avis, avait *surenchéri* le prix de vente, et augmenté le dit prix porté en l'acte de vente faite par le Défendeur au Demandeur, de plus d'un dixième du dit prix,

savoir de la somme de £300. Que pour conserver sa propriété, le Demandeur avait été forcé de *couvrir* la dite *surencière*, laquelle, ajoutée au prix de vente, avait formé la somme de £1300. Que le Demandeur avait ensuite déposé la dite somme en cour, et qu'elle avait été distribuée entre les créanciers du Défendeur. Et concluait au paiement des £300 contre le Défendeur, avec intérêt du jour du dépôt.

Le Défendeur répondit à cette demande par une défense au fonds en fait, et une exception perpétuelle, alléguant que le Demandeur était le débiteur du Défendeur de la somme de £120, étant le montant des intérêts encourus sur les £1000, prix de la vente faite par le Défendeur au Demandeur, savoir, à compter après les quatre mois d'avis préalable à la confirmation de titre, jusqu'au jour du dépôt des £1000 fait en cour dans la demande de ratification ; que pour autant la demande était compensée ; que le Demandeur devait encore au Défendeur £60 pour frais faits sur la procédure en ratification de titre, sur diverses contestations faites par le requérant, le Demandeur en la cause, et par divers créanciers entre eux, lesquels £60 ayant été payés avec les arreux déposés, ou le prix de vente, le Défendeur, (le vendeur) avait droit de réclamer du Demandeur, et les offrait en compensation pour autant à la demande.

La preuve complétée, et la cause plaidée au mérite, la cour intima que la compensation offerte par le Défendeur devait être admise pour les intérêts réclamés par lui, quoique le Demandeur prétendit que les hypothèques contestées entre et par les créanciers, Opposants à la demande de ratification, et les procédures sur la *surenchère*, l'avaient empêché de déposer le prix d'achat plutôt qu'il ne l'avait fait. Que le dépôt fait plutôt, les créanciers du Défendeur n'en auraient pas plus profité.

Le Défendeur prétendit en outre qu'il n'avait pas été partie à la demande en ratification de titre, qu'il lui était permis de soulever dans la présente demande, toutes les questions, irrégularités et omissions qu'il aurait soulevées s'il eut

été appelé comme garant, où partie en icelle. Que l'action devait être renvoyée, parceque les formalités requises par le statut provincial pour la *surenchère*, dans une demande pour ratification de titre, n'avaient pas été suivies et accomplies, il n'était pas prouvé que le créancier surenchérisant, fut créancier hypothécaire. (1) Que le créancier eut enchéri dans le temps prescrit par la loi, qu'il eût fait recevoir son enchère, etc., etc., (2).

Le jugement final est dans les termes suivants : " La cour vu les plaidoyers et la preuve de record, etc., attendu que le Défendeur, vendeur avec garantie de l'immeuble mentionné en la déclaration, est tenu, par suite de la *surenchère* que le Demandeur a couverte, du montant de la dite *surenchère*, équivalente à éviction, que le dit montant a servi à payer soit les créances hypothécaires, soit les dettes du Défendeur, que ce dernier qui était convenu d'une demande de ratification devait veiller à faire éliminer où a désintéresser, les Opposants qui pouvaient surenchérir. Attendu néanmoins, que vu les délais survenus, le Demandeur doit tenir compte au Défendeur des intérêts sur £1000 courant, prix de vente, depuis le huit septembre 1852, temps où la ratification eût pu être obtenue, jusqu'au jour du dépôt judiciaire. Attendu que quant à la somme de £30 courant, réclamée pour frais, il n'appert pas que le Demandeur en ait payé partie, pour le compte du Défendeur, qu'au contraire, d'après les admissions des parties, la somme de £12. 10 a été payée à même la somme distribuée au procureur des Opposants, la Société de Bassesse de Québec, pour frais d'un appel fait par le Demandeur,

(1) 1ere clause de l'acte 9e Geo. IV Chap. 20 :—Grenier, des Hypothèques, No. 446. Sous toutes les législations, les créanciers simplement chirographaires n'ont jamais pu enchérir. L'encherir est un des exercices du droit d'hypothèque.

(2) 9e Geo. IV, Ch. 20, Sec. 2. " Provided also that in default of such creditors tendering and offering such increase in the price, within the delay and in the form aforesaid, the value of the immoveables shall be and remain definitely fixed at the price in the said deed contained."

3 Grenier, Traité des Hypothèques, No. 447, page 326. " La *surenchère* n'a pas d'effet, et la valeur des immeubles reste telle que posées en l'acte de vente, à moins que toutes les formalités de la loi aient été suivies." Le même auteur ajoute : " Cette sévérité sur les formes, admise par la Jurisprudence, contre les créanciers enchérisseurs ne doit pas étonner. Tout ce qui tend à détruire un contrat de vente n'est pas favorable, on a dit, au moins, être soumis à des délais rigoureux."

et dont le Défendeur ne peut-être tenu, mais que le Demandeur doit lui rembourser ; la cour compensation faite condamne le défendeur à payer au Demandeur la somme de £184 courant, intérêt de ce jour, et les dépens."

HOLT et IRVINE, Procureurs du Demandeur.

BELLEAU, Procureur du Défendeur.

COUR SUPERIEURE.—MONTREAL.

Présents : DAY, SMITH et C. MONDELET, Juges.

No. 2681. { THIBEAULT..... *Demandeur,*
vs.
{ DUPRÉ, et al..... *Défendeurs.*

Jugé :—Qu'un acquéreur qui a enregistre son titre ne peut être assujetti à une servitude de coupe de bois imposée sur l'héritage, et dont le titre n'a pas été enregistré, nonobstant la connaissance qu'il pouvait avoir de l'existence de cette servitude.

Held :—That a purchaser who has registered his title deed cannot be bound to suffer a *coupe de bois* to which the property has been subjected, and the title whereof was not registered, although the purchaser had a knowledge of its existence.

Jugement rendu le 29 Septembre, 1854.

L'action était *négative* aux fins de faire déclarer un immeuble acquis par le Demandeur, libre d'un droit de coupe de bois que les Défendeurs prétendaient y exercer en vertu d'un acte à eux consenti par l'auteur du Demandeur, avant l'acquisition de ce dernier. Les Défendeurs, dont le titre n'était pas enregistré, alléguait fraude et collusion de la part du Demandeur, afin de les frustrer de la coupe de bois en question ; qu'ainsi le Demandeur n'était pas acquéreur de bonne foi, et ne pouvait profiter de l'enregistrement de son titre, au détriment des Défendeurs.

Le Demandeur s'appuyait sur le défaut d'enregistrement du titre des Défendeurs, sur l'absence de preuve de fraude, nonobstant la connaissance qu'il pouvait avoir du titre des Défendeurs, et sur le droit de propriété absolue, et libre de

servitude, que lui assurait l'enregistrement de son titre d'acquisition. (1)

La cour maintint l'action par son jugement motivé comme suit :

" Considering that the Plaintiff, under and by virtue of " the deed of sale executed on the 19th August, 1853, and " duly registered, became proprietor and possessor of the " lot of land in his declaration, in the said cause, descri- " bed ; and that the deed of sale of the *coupe de bois*, exe- " cuted to and in favor of the Defendants, on the 16th Ja- " nuary 1843, in the Defendant's exception set forth, hath " not been registered, as required by law, dismissing the " said exception, doth adjudge that the said land is free and " discharged from any right of a *coupe de bois*, in favor of " the Defendants, and which they pretend to exercise there- " upon, and from all servitude in that respect : &c.

LAFRENNAYE et CRESSÉ, pour le Demandeur.

PICHÉ et LAFLAMME, pour les Défendeurs.

COUR DE CIRCUIT.—KAMOURASKA.

Présent :—L'ASCHEREAU, Juge.

PELLETIER, *Demandeur.*

vs.

LAJOIE, *Défendeur.*

Jugé :—Qu'un huissier n'a point d'ac-
tion pour le recouvrement du prix d'effets
saisis et vendus en justice, contre un ad-
judicataire auquel il a livré ces effets
sans se faire payer.

Held :—That a bailiff has no action
for the recovery of the price of goods sei-
zed and sold *en justice*, against the pur-
chaser to whom he has delivered these
goods previously to his being paid.

Jugement rendu le 6 Octobre, 1855.

L'action était intentée par un huissier, contre un adjudicataire, pour le recouvrement d'une somme de £9 0 0, prix d'adjudication de certains meubles saisis et vendus par le

(1) Autorités citées par le Demandeur :—1, Pardessus, Servitudes, p. 30 :—Guyot, Report. vno. Servitude, pp. 307, 311, 312 :—4 Vis. Ch. 30, Sec. 1, et Sec. 28 :—6 Vis. Ch. 15, Sec. 2 :—7 Vis. Ch. 22, Sec. 9.

Demandeur, en sa qualité d'huissier, en vertu d'un bref de Fieri Facias, et en execution d'un jugement rendu en cour de commissaires, et adjugés les dits meubles au Défendeur comme dernier enchérisseur. Le Demandeur alléguait les faits ci-haut, et de plus, que le Défendeur avait été mis en possession ; que néanmoins il avait toujours refusé de payer le montant de l'adjudication ; que lui dit Demandeur était personnellement tenu responsable envers le créancier saisissant des deniers provenant de la vente, et concluait au paiement de la dite somme de £9 0 0.

A cette action, le Demandeur plaida en droit comme suit : " L'huissier est un agent irresponsable auquel l'action ne compétente pas."

Comme second moyen, il fut allégué à l'argument, que cette action, existait-elle en droit, ne pouvait émaner qu'au cas d'un trouble réel de la part du créancier saisissant.

Il fut prétendu par le Demandeur, que son action n'était autre qu'une action *ex contractu*, et que les parties à ce contrat de vente et adjudication ne pouvaient être autres que l'huissier et l'adjudicataire, l'adjudicataire se portant acquéreur, et l'huissier vendant et livrant au nom et par l'autorité de la justice. Que la partie saisissante, n'était nullement concernée en ce contrat, si bien, que l'action pour livraison, au cas où elle serait nécessaire, ne compéterait que contre l'huissier ; qu'il n'était pas l'agent de la partie saisissante, mais bien l'agent de la justice, son seul représentant, et le seul qui en cette qualité se liait envers la partie avec laquelle il contractait, comme il la liait envers lui.

Le Demandeur observa, que la prétention invoquée par lui, avait été maintenue à Québec, en faveur du shérif, réclamant en son nom le prix d'objets pat lui saisis et vendus

sur Fieri Facias. (1) Il cita en outre la cause de Stevenson vs. Boston (2) et celle de Dinning et Jeffery. (3)

La défense en droit fut maintenu et l'action renvoyée. En rendant jugement, la cour observa que l'on ne pouvait assimiler l'huissier au shérif, officier inconnu en France, et existant sous l'autorité et le contrôle des lois anglaises, et qu'ainsi le précédent invoqué par le Demandeur, et jugé en faveur du shérif, dans la cause de Sheppard vs. Paquet, pouvait n'être pas applicable au cas d'un huissier. Que le shérif donne un titre à l'adjudicataire, pouvoir dont ne sont pas investis les huissiers. Que le Demandeur avait violé son devoir, en délivrant les effets adjugés, sans en exiger le prix sur le champs. Qu'enfin il n'apparaissait pas que le Demandeur fut troublé. (4)

BERTRAND et CHALOU, pour le Demandeur.

TACHÉ, pour le Défendeur.

(1) No. 102 de 1813. Sheppard vs. Paquet. "The Sheriff can maintain an action in his own name, for the price of moveables sold on a Fieri Facias, and delivered to adjudicataire. For by delivery before payment, he adopts the contract which was made originally between the adjudicataire, and himself, and makes it personally his own." Jousse—Serpill, on art. 17 of tit. 33. Ord. 1667.

(2) 2. L. C. Rep. p. 17.

(3) 2. L. C. Rep. p. 118 et la même cause jugée en cour d'Appel p. 360

(4) Autorités citées à l'appui du jugement. Art. 17 du titre 33, Ord. 1667.

Les choses saisies seront adjugées au plus offrant et dernier enchérisseur, en payant par lui, et sur le champ, le prix de vente.

1 Pigeau, Proc. Civile, p. 643, de l'exécution du jugement. S'il ne payait pas; et que l'huissier lui eut délivré la chose, celui-ci en est responsable, sauf son recours vers l'acheteur contre qui il peut obtenir la contrainte par corps, comme acheteur judiciaire.

Ferrière, Dict. de Droit. vbo, Saisie exécution. Les choses y doivent être adjugées au plus offrant et dernier enchérisseur, et les adjudicataires doivent en payer le prix sur le champ, art. 17, sinon, l'huissier ou sergent en serait responsable, comme s'il l'avait reçue.

Ravaut, Pratique civile du Palais, p. 269. Quoique les huissiers, qui doivent exiger sur le champ le prix des choses vendues ne l'aient pas reçu, la vente n'en est pas moins parfaite, et si l'adjudicataire ne le paye pas, elles peuvent être vendues sur le champ, à sa folle enchère, au paiement de laquelle il doit être contraint par corps, de même qu'il le serait au paiement du prix entier des meubles achetés, s'ils ne se revendraient pas.

Art. 439. Coutume d'Orléans. p. 777.

Un acheteur de biens vendus à l'encausse, la solemnité de justice gardée, peut être contraincu par prison.

Note.—Venir à l'encausse, la solemnité de justice gardée, c'est vendre par le ministère d'un sergent qui orie les choses à vendre, et les adjuge au dernier enchérisseur.

Note 3.—Contraint par corps. Car ces ventes se font *præsenti pecunia*, personne ne doit enchérir qu'il n'ait son argent prêt, d'ailleurs la vente se faisant par autorité de justice, celui qui se rend adjudicataire, contracte avec la justice, et est par cette raison contraignable par corps.

BANC DE LA REINE. } DISTRICT DE MONTREAL.
EN APPEL.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef,
DUVAL et CARON, Juges.

IRWIN, *Appelant:*
et
BOSTON, *et al.* *Intimés.*

Jugé :—Qu'une partie dont les effets ont été saisis par le Shérif, par voie de saisie revendication, et qui en a obtenu main-levée, peut procéder contre le Shérif pour en obtenir le recouvrement, non seulement par règle dans la cause même dans laquelle la saisie a eu lieu, mais aussi par action directe contre le Shérif pour obtenir ces effets, ou leur valeur, et de plus les dommages qui lui sont résultés par le défaut de livraison de ces effets.

Held :—That a party whose property has been attached by *saisie revendication*, and who has obtained *main-levée* of the same, may proceed against the Sheriff for the recovery of the said goods, as well by rule of court in the cause, as by action against the Sheriff to obtain the said property, or the value thereof, together with such damages as may have been suffered by reason of the non delivery of the same.

Jugement rendu le 12ème Mars, 1855.

Macpherson, Crane et Cie. firent émaner, le 4 mai 1849, une saisie revendication, en vertu de laquelle les Intimés en la cause, comme étant alors shérif du district de Montréal, par leurs huissiers ou députés, saisirent entre les mains de l'Appelant un engin de bateau à vapeur composé d'une certaine quantité de pièces, valves etc., et les confierent aux soins d'un nommé Alexander Mackenzie, gardien nommé à la dite saisie ; l'huissier exécutant cette saisie avait enlevé le dit engin de la possession de l'Appelant, et l'avait transporté, dit l'action de l'Appelant en Cour Inférieure, chez Macpherson, Crane et Cie., ou leurs employés.

Cette saisie revendication fut ensuite déclarée nulle et mise au néant, par jugement du 24 juillet, 1849, qui enjoignait aux Intimés de remettre le dit engin à l'Appelant.

Cet ordre fut signifié aux Intimés qui ne s'y conformèrent pas.

Tels sont les faits sur lesquels était basée l'action intentée en mai, 1853, par l'Appelant contre les Intimés. Il alléguait

de plus, que par le refus et la négligence des Intimés de se conformer à l'ordre du 24 juillet, 1849, il avait souffert des dommages au montant de £250 ; et il concluait à ce que les Défendeurs fussent condamnés, conjointement et solidairement, à lui restituer et livrer tous les effets saisis comme susdit, et à y être contraints par corps, jusqu'à telle restitution, ou au paiement de £1000, valeur du dit engin ; concluant en outre à ce que les dits Intimés fussent condamnés à lui payer la somme de £250, pour la perte et les dommages par lui soufferts, et se réservant de prendre plus tard telles autres conclusions que de droit.

Les Défendeurs, Intimés, opposèrent à cette demande une défense au fonds en droit, les raisons au soutien de laquelle sont :

1o. Parceque les Défendeurs n'ont pas eu avis de la présente action tel que requis par la loi.

2o. Parceque le Demandeur allègue dans sa déclaration que l'huissier a transporté les effets chez Macpherson, Crane et Cie., et que les Défendeurs n'en peuvent alors être responsables.

3o. Parcequ'il est dit dans la dite déclaration, que les effets ont été livrés à Macpherson, Crane et Cie., sans aucun acte de la part des Défendeurs, et que l'Appelant devait alors se pourvoir par saisie revendication contre Macpherson, Crane et Cie., et non pas contre les Défendeurs par la présente demande.

4o. Parceque les Défendeurs n'avaient aucun contrôle sur les dits Macpherson, Crane et Cie.

5o. Parceque le Demandeur n'allègue pas que le gardien ait été mis en demeure de livrer les effets, ni que des procédés aient été adoptés contre lui.

6o. Parceque le Demandeur n'allègue pas si le jugement du 24 juillet, 1849, a été mis en force, ou abandonné, ou si appel en a été interjeté ; et que ce jugement peut donner

un droit d'exécution contre les Défendeurs, mais non un droit d'action tel que celui invoqué en la cause.

7o. Parceque tant que l'ordre du 24 juillet, 1849, demeure en vigueur, aucune action ou poursuite ne peut être portée devant le même tribunal pour obtenir un second jugement ordonnant la restitution des mêmes effets au Demandeur.

8o. Parceque le Demandeur, d'après ses allégués, devait procéder par exécution ou règle en vertu du dit ordre, et non par action, le Demandeur ne mentionnant pas dans son action que les Défendeurs avaient cessé d'être, conjointement, shérif du district de Montréal, et officiers de cette Cour.

9o. Parceque les conclusions sont contradictoires, incompatibles, cumulatives et illégales.

10o. Parceque dans ses conclusions, le Demandeur ne demande pas que la cour prononce sur la propriété des dits effets, qu'il ne demande pas condamnation contre les Défendeurs pour les £1000, et ne mentionne pas par qui cette somme devra être payée.

11o. Parceque, le Demandeur par son action réclame £250, par forme de dommages à raison de la négligence des Défendeurs de se conformer au jugement de la cour, du 24 juillet, 1849, sans alléguer comment il a souffert ces dommages, ni qu'il ait cherché à mettre à exécution le susdit jugement.

12o. Parceque le Demandeur ne montre aucun droit d'action, et qu'il a réuni dans une seule et même demande des énoncés de matières d'action réelle, de règle pour contrainte par corps, d'action pour valeur de meubles et effets, et pour dommages résultant de l'inexécution d'un ordre de cour, tels allégués étant incohérents, incompatibles et inadmissibles dans une seule et même action.

Les deux autres raisons sont générales.

Sur audition en droit, la Cour Supérieure adjugea en faveur des Défendeurs, le motif du jugement est comme suit :

“ Considering that the judgment, in the said declaration “ alleged to have been rendered in the cause of John Mac-“ pherson, and others, against James Irwin, on the 24th day “ of July 1849, ought to have been enforced and carried “ into execution, by rule or other process in that cause, ac-“ cording to law, and the practice of this Court, and that “ no action can by law be brought in the manner and form “ in which the Plaintiff hath now impleaded the Defendants, “ for the revendication or recovery of the goods and chattels “ which the Defendants are therein and thereby ordered to “ deliver up to the Plaintiff, maintaining the *défense au* “ *fonds en droit*, doth dismiss the said action, with costs,

Ce jugement porté en appel y a été infirmé. (1)

“ The court &c., considering that the allegations contained in the Plaintiff’s declaration, in the Court below, are sufficient in law, if proved, to entitle the said Plaintiff to the conclusions by him taken in and by the said declaration : Considering further that the causes assigned by the Defendants, in support of the demurrer by them filed in the said court, are insufficient in law to entitle the said Defendants to the conclusions of their said demurrer, or to any part thereof : Considering that in the judgment pronounced by the court below, on the twenty seventh day of October one thousand eight hundred and fifty three, maintaining the said demurrer, and dismissing the action of the said Plaintiff, there is error :—doth reverse and set aside the judgment so pronounced on the twenty seventh day of October, one thousand eight hundred and fifty three. And this court proceeding to ren-

(1) Autorités citées par l’Appellant :—Stuart’s Reports. p. 75, McClure and Shepherd :—Condensed Louisiana Reports. p. 221, Clark’s Executors vs. Morgan :—9 Geo. IV, Ch. 6. Sect. 9 :—14 et 15 Vict. Ch. 54.

Autorité citée par les Intimés.—Pelton vs. Murray, jugée à Montréal.

der the judgment which the Court below ought to have rendered, doth overrule the said demurrer, with costs; as well in this court as in the court below.

ROBERTSON, A. et G. pour l'Appelant.
ROSE et MONK, pour les Intimés.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices

No. 2670: { CHOUINARD, Plaintiff
DEMERS, Defendant.
and
GAREAU, *Tutor ad hoc*, Opposant.

Held:—That an opposition to the sale of real estate by a *Tutor ad hoc*; authorised to act for minors, is maintainable without registration of such *Acte de Tutelle*, and that the 24th section of the registry ordinance, 4th Vict. Ch. 30; does not apply to such oppositions.

Jugé:—Qu'une opposition à une vente d'immeubles faite par un Tuteur *ad hoc*, autorisé à agir pour des mineurs, doit être maintenue, nonobstant le défaut d'enregistrement de l'*Acte de Tutelle*, et que la 24me section de la 4me Vict. Ch. 30, n'est pas applicable à de telles oppositions.

Judgment rendered the 30th May 1855.

In this cause an opposition to the sale of a lot of land, seized as belonging to the Defendant, was made by Joseph Gareau, in his capacity of *Tutor ad hoc* to the minor children of the Defendant, by a first and second marriage. The opposition was founded on a deed of donation of the land seized, made by the Defendant, on the 21st December 1850, to the said minors, accepting by the Opposant, as *Tutor ad hoc* specially appointed, the *Acte de Tutelle* under which the opposition was filed was dated the 4th January, 1854. The Plaintiff contested the opposition by a *Défense au fonds en Droit*, the sole ground of which was that there was no allegation in the opposition of the registration of the *Acte de Tutelle* last mentioned.

DAY, Justice:—It was argued that the section of the Registry Ordinance does not apply, 1stly, to a *Tutor ad hoc*; nor,

2dly, to oppositions. We are with the Opposant on the *second* point. The language of the section is that no *action* shall be brought or be maintainable until after registration &c. It says nothing of a defence or opposition ; and one can easily conceive a sufficient reason for the restrictive language of the statute, an action is instituted voluntarily, the Plaintiff takes his time, an Opposant, on the contrary, may be called upon to act at once in order to protect the rights of minors which might otherwise be sacrificed. The Court is satisfied as well from the spirit of the clause, which was intended for the protection of minors and other parties named, as from its language, that the *Défense* cannot be maintained : It is therefore dismissed.

The judgment is not *motive*.

OUIMET, MORIN and MARCHAND, for Plaintiff,
LAFLAMME, R. and G. for Opposant.

4th Vict. C. 30th S. 24.—And be it further ordained and enacted that no action shall be brought, or be maintainable, in any of Her Majesty's Courts of justice in this Province, in the name, or by, or on the part of any husband, for any cause of action derived from or under his contract of marriage, whereof the registration is required by this Ordinance, or in the name, or by, or on the part of any tutor or guardian to a minor or minors, or of any curator to a person or persons interdicted, in such capacities respectively, until after a memorial shall have been registered, in the manner prescribed by this Ordinance, of such contract of marriage, or of the appointment of such tutor or curator respectively.

SUPERIOR COURT.—MONTREAL.

Before : DAY, VANFELSON, and MONDELET, Justices.

No. 923. { MACPHERSON *et al.* Plaintiffs.
 vs.
 THE ST LAWRENCE INLAND MARINE INSURANCE COMPANY Defendants.

Held :—That in an action on Insurance Policies, issued in Upper Canada, service in Montreal, at the Defendants' agency there, of process against an Insurance Company incorporated and having its chief place of business in Upper Canada, is not sufficient ; the agent, on whom process was served, not having charge of an office belonging to the Company for the transaction of its business generally, and without limitation.

Jugé :—Que dans une action fondée sur une Police d'Assurance faite dans le Haut-Canada, signification du writ à Montréal, sur l'agent des Défendeurs, Compagnie d'Assurance incorporée et dont le chef lieu des affaires est dans le Haut-Canada, est insuffisante ; l'agent, sur lequel la signification avait été faite, ne tenant pas un bureau appartenant à la Compagnie pour transiger généralement toutes ses affaires, et sans restrictions.

Judgment rendered the 17th October, 1853.

This action was brought to recover the amount of certain Insurances, alleged to have been effected by the Plaintiffs on their steamer *Comet*, under policies of Insurance made by the Defendants, at Kingston in Upper Canada, on the 18th April, 1851. The declaration contained allegations setting forth that the Defendants were incorporated under a Statute of Upper Canada, cited in the declaration, “ and that “ at all and every the time and times hereinafter mentioned, “ the said Defendants were, and still are, a body politic and “ corporate, carrying on the business of insurers at Montreal “ aforesaid, and elsewhere,—that they, the Defendants, had, “ at the said several time and times, and still have an “ office in the City of Montreal for the purpose of carrying “ on their said business of Insurers, and were then and “ there, and are now represented by a legally authorized “ and accredited agent or representative, and that the said “ Defendants were and are possessed of personal estate and “ property, goods and chattels, monies, credits and effects “ within the District of Montreal.”—The return of the Bailiff was that he had served the writ and declaration at

the office and place of business of the Defendants, No. 9, Lemoine Street, City of Montreal, speaking to Charles Theodore Palsgrave, who then and there declared himself to be the agent of the Defendants.

The Defendants pleaded by exception, *in de non proceder*, in effect, as follows:

That the Company had been incorporated by Act of the Legislature of Upper Canada, 3 Wm. IV, Chap. 20; that their chief place of business, and only legal domicil, was at Prescott in Upper Canada;—that the contract, alleged in the three counts of the declaration, was but one policy for £1000, (that produced by the Plaintiffs) and was issued by the Defendants' agent at Kingston, in favor of Macpherson and Crane, of Canada West, Forwarders;—that the steamer *Comet* plied in Upper Canada, and never was in Lower Canada from the date of the Policy to the institution of the action;—that this action could not legally be instituted or prosecuted in this Court, or in Lower Canada; that the Defendants had no legal or other domicil in Lower Canada at which process could be served;—that although the Defendants had an agency in Montreal, and the writ and process were served upon Palsgrave their agent, yet that such agency was not their legal domicil for any other purposes than such as specially appertained to such agency.

Conclusion:—That the writ and process and the declaration be declared null and void, and the action dismissed.

The Plaintiffs, by their answer to the exception, in effect, reiterated the allegations quoted above, as to the incorporation of the Company, and their carrying on business at Montreal.

The only witness examined in the case, on the issue raised, was Mr. Palsgrave. It appears, by his deposition, that he was the Defendants' duly appointed and authorized agent at Montreal, whose risks were taken, and premiums paid, for Lower Canada only, the policies being comitted

signed by the witness, as agent of the Defendants ;—that over his office door there was a plate with the words : “ Agency St. Lawrence Inland Marine Assurance Company ; ” that he had monies belonging to the Defendants in his hands ;—that settlements of all policies were effected at the Company’s office at Prescott, and that Insurances were usually paid through his office by remittances from Prescott. He states : “ The office of the Defendants’ agency, in Montreal, mentioned in my examination in chief, is also my own private office, and I have never looked upon it as the office of the Defendants, for any other business than such as related to Insurances for which I issued policies, countersigned by myself as their agent.”

DAY Justice :—The question as to whether a foreign corporation can be impleaded here by service of process on its agent does not arise from the pleadings of record. It does not appear from Mr. Palsgrave’s evidence, and he is the only witness examined, that the Defendants had any office here, at which service could legally be made. He was their agent for *specific* purposes, only, and, on that ground, service of process can not legally be made upon him. The statute points out a mode by which foreign corporations may be legally summoned, but that course has not been followed, and the action must therefore be dismissed.

JUDGMENT :—“ Considering that it appears that Charles Theodore Palsgrave, upon whom process, in this cause, hath been served, was then the agent of the Defendants for certain specified and limited purposes only, and was not an officer or servant of the said Defendants having charge of an office to them belonging for the transaction of their business generally, and without limitation, and that by reason of the limited powers of the said Charles Theodore Palsgrave, and by law, the Defendants have not been regularly and sufficiently summoned and impleaded before the Court, now here, by the service of process, as aforesaid, upon the said Charles Theodore Palsgrave,—doth maintain the said

exception, and adjudge and declare the service of the writ and process in this cause to be null and void, and the same doth set aside and dismiss, with costs against the Plaintiffs.

ROSE and MONK, for the Plaintiffs.

GRIFFIN, F. for Defendants.

BANC DE LA REINE } EN APPEL. DISTRICT DE MONTRÉAL.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef,
AYLWIN, DUVAL et CARON Juges.

McGILLIVRAY,..... Appelante.
et

THE MONTREAL ASSURANCE COMPANY,..... Intimés.

Jugé :—Qu'une poursuite pour le recouvrement du montant d'une Police d'Assurance, contre le feu, peut être soumise à un Jury.

Held :—That a suit for the recovery of the amount of a Policy of Insurance, against fire, may be tried by a Jury.

Jugement rendu le 12 Mars 1855.

L'Appelante poursuivait les Intimés pour le recouvrement d'une somme de £3000, montant d'une assurance dite avoir été effectuée par l'intermédiaire de J. Hays pour le bénéfice de la Demanderesse, sur une propriété appartenant au dit J. Hays, et sur laquelle la dite Appelante avait une hypothèque. Les Intimés opposèrent des moyens de droit, et des moyens de fait à l'action, et la contestation ayant été liée, l'Appelante inscrivit la cause pour audition sur les moyens de droit, et en même temps fit une motion demandant que les matières de fait fussent soumises à un jury spécial, à être choisi pour cet objet, et que la Cour appointât les jours qu'elle jugerait convenables pour le choix du jury et la preuve ; et qu'il fut permis à la Demanderesse de faire émaner un bref de *Venire Facias*, enjoignant au Shérif de convoquer, pour ce procès, un jury composé de marchands et commerçants parlant la langue anglaise.

Cette demande fut combattue par les Intimés, et le 17 octobre 1854, la Cour Supérieure, à Montréal, rendit le jugement suivant :

“ La Cour, parties ouies sur la motion de la Demandereuse, aux fins de soumettre la contestation liée par les plaidoiries en cette cause à un jury spécial, après avoir examiné la procédure et en avoir délibéré ; considérant que la Demandereuse n'est ni commerçante, ni marchande, et, en conséquence, ne peut, en droit, obtenir l'épreuve de cette cause par jury, rejette la dite motion, avec dépens.”

(L'Hon. Juge Vanfelson *dissentiente.*)

L'appel était interjeté de ce jugement, l'Appelante appuyait sa demande sur l'Ord. de la 25 Geo. 3, Ch. 2. Section 9, et sur le Statut 14 et 15 Vict. C. 89, Sect. 4, (version française.) (1)

Les Intimés soutinrent le bien jugé. (2)

La Cour d'Appel infirma le jugement du tribunal inférieur.

The Court, &c. :—1o. Considering that under the fourth section of the Jury act, passed in the session of Parliament, held in the fourteenth and fifteenth years of Her Majesty's Reign, chapter eighty nine, which section relates to Jury trials in civil suits, the Appellant, Plaintiff in the Court below, though not being a trader or merchant, is nevertheless entitled to obtain a trial by Jury in this cause ;—2o. Considering, therefore, that in the Judgment of the Court below, that is to say, the Judgment rendered by the Superior Court at Montreal, on the seventeenth day of October, one thousand eight hundred and fifty three, by which the motion of the said Plaintiff that the issues raised in this cause be tried by a special Jury, is rejected with costs on the ground that the Plaintiff is not a trader or merchant, and by reason thereof, and by

(1) Dwarris on Statutes, pp. 718, 719, 720 et 721.

(2) Autorités citées par les Intimés :—25, Geo. 3, Ch. 2. Sect. 9 et 10 :—4 Guil. IV, Ch. 33, Sect. 16 :—10 et 11 Vict. Ch. 13, Sect. 34, 35, 36 et 40 :—14 et 15 Vict. Ch. 69 Sect. 4, Sect. 3 et 8.

law, not entitled to obtain the said trial by Jury, there is error :—It is considered and adjudged that the said Judgment be, and the same is hereby reversed and set aside ; and the Court proceeding to render the Judgment which the Court below ought to have rendered, doth grant so much of the said motion as prays for a trial by Jury, and no more. Thereupon, it is adjudged that the record be remitted to the Court below, to the intent that such further proceedings be there had as to law and justice appertain in the premises ; and lastly it is ordered and adjudged that the party Respondent do pay to the Appellant the costs by her sustained in this behalf, as well in the Court below as in the Court here.

ABROTT, pour l'Appelante.

CROSS et BANCROFT, pour les Intimés.

BANC DE LA REINE } DISTRICT DE MONTREAL.
EN APPEL.

Présents : Sir L. H. LA FONTAINE, Barommet, Juge-en-Chef,
AYLWIN, DUVAL et CARON, Juges.

No. 5. { NYE,..... *Appelant,*
et
COLVILE, *et al.*,..... *Intimés.*

Jugé :—Qu'une sentence déboutant une action hypothécaire, faute de preuve de la possession du Défendeur de l'immeuble hypothéqué, ne peut soutenir une exception de chose jugée, opposée à une nouvelle demande fondée sur la possession actuelle du Défendeur, la possession étant un fait qui se renouvelle de jour en jour.

Held :—That a judgment dismissing an hypothecary action, for want of proof of possession by the Defendant of the property hypothesized, cannot be opposed by exception of *rei judicatae*, to a subsequent demand, founded on actual possession, possession being a fact which is renewed day by day.

Jugement rendu le 2 Juillet 1855.

Le 22 mai 1847, le nommé Thomas Wilson consentit, devant notaires, une obligation en faveur des Intimés pour £150, payables par termes, et hypothéqua pour sûreté du paiement de cette somme certains immeubles acquis depuis par l'Appelant. En octobre, 1850, ce dernier fut poursuivi hypothécairement par les Intimés, pour la somme de

£120 12 6, étant le montant de trois termes de la dite obligation, alors échus, et intérêt sur iceux. Jugement fut rendu contre lui par défaut en la Cour Supérieure, le 16 avril 1851, et sur appel par lui interjeté, la Cour du Banc de la Reine, par sentence du 12 octobre 1852, infirma le jugement de la Cour Inférieure, considérant la preuve de la possession par l'Appelant insuffisante, vu qu'elle n'était établie que par la production d'une copie de l'acte d'acquisition de Nye, délivrée par le Registrateur sur le document enfilé dans son bureau pour inscription d'icelui. (1)

En décembre 1852, les Intimés poursuivirent de nouveau l'Appelant, mais pour le montant entier de l'obligation, le dernier terme de paiement étant échu, alléguant que Nye avait acquis l'immeuble en question, le 17 mars 1849, et qu'il en était alors, savoir, au temps de l'institution de la seconde action, le détenteur.

Nye plaida d'abord l'exception de chose jugée, suivant l'arrêt de la Cour du Banc de la Reine du 12 octobre, 1852, intervenu sur les mêmes causes d'action ; puis une seconde exception de chose jugée, du moins jusqu'à concurrence de £120 12 6, montant de la première demande, et enfin une défense au fonds en fait.

Les Intimés répondirent aux exceptions, en établissant que la première demande avait été déboutée faute de preuve de la possession, par le dit Nye, *au temps de l'institution* de cette première action, et que la demande n'était pas pour la même somme, et que la première action n'avait été déboutée que par suite d'une erreur dans la procédure, et la production d'une copie non authentique de l'acte d'acquisition de Nye.

La preuve faite, la Cour Supérieure débouta ces exceptions par jugement du 29 avril 1854, motivé comme suit : " Considering that the Plaintiffs have established by " evidence the material allegations of their declaration, and

(1) Voir 3, Décisions des Tribunaux du Bas-Canada. p. 17.

" that the Defendant hath failed to prove, in support of the
" exception of *chose jugée* by him in the said cause pleaded,
" that the causes of action whereupon, and by reason where-
" of, the Plaintiff now seeks to recover judgment *en decla-*
" *ration d'hypothèque* against the Defendant, are the same
" causes of action whereupon, and by reason whereof, the
" Defendant was heretofore impleaded by the action in the
" said exception set forth, inasmuch as the last mentioned
" action was founded upon an alleged possession by the
" Defendant, as *tiers détenteur* of the land and premises
" in the said declaration mentioned, at the time the same
" was instituted, and which the Plaintiffs failed to prove,
" whereas the present action is founded upon the possession
" of the Defendant, as *tiers détenteur*, of the said land and
" premises at the time of the institution thereof ; dismissing
" the said exceptions, &c.,"

Nye appela mais inutilement de ce jugement qui fut confirmé par la Cour du Banc de la Reine.

LORANGER et POMINVILLE, pour l'Appelant.
Rosé et Monk, pour les Intimés.

SUPERIOR COURT.—MONTREAL.

Before DAY, SMITH and MONDELET, Justices.

No. 1091. { CASTLE, Plaintiff,
 BABY, Defendant
 vs.

1. Held :—That an agent has no authority to bind his principal by signing and discounting a promissory note as agent, although authorized, by written power of attorney, to manage, administer, sell, exchange and concede the real and personal estate of the principal, and to collect, compound and arbitrate all claims and debts, with a general clause empowering him "to do all acts, matters and things, whatsoever, in and about the property, estate and affairs of the principal as amply and effectually, to all intents and purposes, as the principal could have done in her own person if the said power of attorney had not been made."

2. That an agent with the powers above mentioned is an *administrator omnium bonorum*, with no power to borrow, except for purposes within the limits of his administration.

3. That the declarations of the agent to an accommodation endorser, to obtain his endorsement, are not evidence in a suit against the principal by the party who afterwards discounted the note.

Jugé :—1o. Qu'un agent ne peut obliger son principal, en signant et escomptant, comme tel agent, un billet promissoire, quoique autorisé, par procuration écrite, à gérer, administrer, vendre, échanger et concéder les biens meubles et immeubles de son principal, et de recouvrer toutes dettes et réclamations, et de faire tous compromis et artificages avec clause générale l'autorisant "à faire tous "actes, matières ou choses, quelconques, "relativement aux propriétés, biens et "affaires du principal, aussi amplement "et effectivement, à toutes fins quelconques, que, que l'aurait pu faire le principal "lui-même, si la dite procuration n'eut "pas été exécutée."

2o. Qu'un mandataire revêtu des pouvoirs ci-dessus mentionnés est un *administrator omnium bonorum*, qui ne peut faire d'emprunt, si ce n'est pour des objets relatifs à son administration.

3o. Que les déclarations du mandataire à un endosseur pour accommodation, afin d'obtenir son endossement, ne peuvent être produites en témoignage contre le principal, par la personne qui a subéquemment escompté le billet.

Judgment rendered the 19th April 1854.

Action on a promissory note, dated 4th September, 1837, payable to the order of Samuel Gerrard, for £450, signed, "F. Baby, agent of Margaret Selby."

Plea :—1o. That the said François Baby had no power to sign the note in question ; that he had no other authority than was conferred on him by a notarial power of attorney of the 3rd October, 1835, given by the Defendant, as well in her own name, as in her capacity of *légalitaire universelle en usufruit* of William Dunbar Selby, her late husband, and of the late George Selby, her husband's father, and as tutrix to the minor children, issue of the Defendant's mariage with her said late husband ;—that by the power of attor-

ney, filed in the cause, the said Baby had the power of administering the property of the Defendant during her absence in Europe, and especially the Seigniory of Lasalle, but had no power to sign notes ; that, moreover, the Defendant had never received any portion of the sum sued for, nor was the same, nor any part of it, ever employed about her business, or for her benefit.

Plea :—2. Défense au fonds en fait :

The Plaintiff by special answer to the exception alleged that Baby was the duly accredited agent of the Defendant, with power to sign the note in question, and that the sum of money sought to be recovered, being the proceeds of the said note, when discounted, was remitted to the Defendant and received by her in Europe, and applied to her own use.

Three witnesses were examined to prove the making and indorsing of the note, which was declared upon as a missing or lost note. The only other depositions taken were those of Samuel Gerrard and François Baby, extracts from which are quoted below. Objections were made to the examination of Baby on the ground of relationship, he being the brother of the Defendant, and on the ground of interest ; also to certain questions, as well to the witness Baby, as to Gerrard, tending to prove the authority of the agent to sign the note, and of declarations made by him in relation to the note. These objections were overruled both at enquête and by the final judgment.

*Day, Justice :—*This is an action against the Defendant on a promissory note alleged to have been made by her agent, François Baby, in favor of Samuel Gerrard, and by him endorsed to the Plaintiff. The note is lost, but there is no difficulty on that point. Its disappearance is accounted for, and the Plaintiff offers security. The question turns solely on the authority of the agent to sign the note. When at the bar, I brought an action against the endorser on this note ; this was made known to the counsel, and no steps

have been taken in recusation, so that I am not at liberty to decline giving my opinion; but this opinion does not coincide with the views entertained by the majority of the court. In 1835, the Defendant, being about to leave this country for Europe, gave a power of attorney to her brother; under this power he was authorized to manage and administer her property, particularly the Seigniory of Lasalle, also to sell, concede and exchange all her property, including the Seigniory, and all her lands in Lower-Canada, except certain houses in Montreal; with power to pay all debts, to submit claims to arbitration or to compound the same, to institute and defend all actions, and also with a general power to do all matters and things relative to her estate, as if she were personally present. Another power of attorney was given the same day to Edward Henry, reciting that given to Baby, and giving Henry power to mortgage the Defendant's property in favor of such persons as might advance or lend money to Baby.

A motion was made to reject the deposition given by Baby on the ground of relationship and interest, as also those portions of his deposition, and that of Mr. Gerrard, tending to prove the acts and declarations of Baby as agent. This motion, is in my opinion, unfounded. Under the 12th Vict. Cap. 22, and the 14th and 15th Vict. Cap. 52; Sec. 4, the English rules of evidence are applicable, not to extend the power of attorney, for that must speak for itself. Baby's evidence however is admissible to prove that he did certain acts, and evidence can be given also as to what was said by him at the time of his creation, and the court can then decide whether he was authorized in that respect under his power. Mr. Gerrard says that Baby stated at the time of the indorsation that the money was to be sent to the Defendant in Europe, to enable her to return to Canada, and that this induced him to indorse the note. I think this is evidence, as is also the deposition of Baby, to prove that he got the

note discounted and applied the proceeds to the Defendant's benefit. (1). Taking, therefore, the evidence of Baby as to the application of the monies, the declarations made to Gerrard, and the terms of the power of attorney, I should hold the Defendant liable. Under the French law, I consider the Plaintiff's case stronger than under the English law, I hold that general words may give power to borrow money, or what is the same thing to make a promissory note. In England I can find no case which would shew that a party with a general power to borrow, had need of a special power to make or sign a note. The case of Howard *vs.* Bailey (2) establishes that although a power must be strictly pursued, yet it is to be so construed as to include all the means necessary to execute it. Paley supports the doctrine that a general agent can not accept bills. (3). Pothier holds that an administrator cannot alienate, nor can he hypothecate the property of his principal, because hypothecation tends to alienation; but he may bind the property of the principal by borrowing what he calls *sommes modiques*. The question may be asked whether the sum of £450 was not a *somme modique*. And besides I take it as proved that the monies were employed for her benefit. (4) On these grounds I dissent from the judgment about to be rendered, and would give judgment for the Plaintiff.

SMITH, Justice:—I have seldom met with a case in which my opinion was more strongly formed than the present. The note purports to be signed by the Defendant's agent, the indorsement of Gerrard was an accommodation indorsement. The plea sets up the power of attorney as it was actually given to Baby, and alleges that he had no power to sign notes, and that the proceeds of the note never came

(1) Starkie on Evidence, pp. 55, 596:—1 Espinasse pp. 89, 115:—2nd Espinasse, p. 509, Mathews *vs.* Haydon:—7. Term Reports p. 481, note, Evans *vs.* Williams:—10 Vesey p. 121, Fairley *vs.* Hastings:—4. Taunton, p. 579, Langhorn *vs.* Allnutt.

(2) 2. H. Blackstone, p. 618.

(3) Paley, on Agency, pp. 193, 195, 196, and cases there cited:—See also 6 Term Rep. p. 591, Gardner *vs.* Baillie:—Pothier, Mandat, Nos. 147, 148, 160.

(4) See also Story, on Agency, No. 21:—Troplong, Mandat, Nos. 285, 286.

into her possession. The power of attorney to Edward Henry is also produced ; and the powers given to Baby seem to me to be those of general management and administration. It was an *administratio omissum bonorum*, but still an administration. I deny that this gives power to the agent to borrow generally. He may borrow, but for the purposes of administration only. Suppose she had said in express terms : " I give you power to borrow, but for the purposes of administration only," she would have given expressly in the case supposed, the authority which in my opinion was conferred by the power of attorney filed in this cause. The superadded powers do not alter the general power of administration, nor does the power to Henry give, nor can we construe it as recognizing, any new powers in Baby. It was given to control Baby, and the borrowing contemplated, and the security to be given by way of mortgage was simply for sums that might be required in the administration of her property. If there had been evidence that the Defendant had got the money arising from the proceeds of the note she would, I think, have been liable. (1) The court thinks the english law cannot be held to govern this case, it may govern as to proving the signature, but not to extend the powers given to the attorney. The limitations of the attorney's power are the same in France as in England. The right to indorse, for instance, is limited to what is within the scope of the authority given, and the making of the note in this case does not seem to me to be within the scope of the agent's powers. Baby's powers are not to be tried by Gerrard's rights. What was said to Gerrard has nothing to do with what was said to the Plaintiff ; and although evidence can be adduced as to the declarations of the agent at the time he acts, we have no evidence as to any declarations made to the Bank at the time of discount. Baby's cross-examination shews that he cannot state how the monies were employed, and the Defendant examined on

(1) Merlin, Rep. Mandat, p. 235 ;—Merlin, Procuration, pp. 709, 710.

feats et articles says in distinct terms that they never came into her hands. Upon the whole case I am clearly of opinion that the action must be dismissed.

JUDGMENT:—“The Court having heard the parties by their counsel upon the merits of this cause, and on the motion of the Defendant to reject the deposition of François Baby, a witness examined in this cause on the part of the Plaintiff, and also to reject that part of the deposition of Samuel Gerrard, witness examined in this cause on the part of the Plaintiff, tending to prove the quality of the said François Baby as agent for the Defendant, having examined the proceedings and evidence adduced, and having upon the whole duly deliberated, doth maintain the said motion, and doth so reject the said deposition. And it is considered and adjudged that the action be, and the same is hence dismissed, for want of proof, with costs. Mr. Justice Day dissents from this judgment.”

Rose and Monk, for Plaintiff,
Peltier and Bourret, for Defendant.

Extracts from the deposition of S. Gerrard:—

Question:—“When the said François Baby came to ask “you to endorse the said note, what did he inform you he “desired to do with the proceeds of the said note ?

Answer:—“He told me it was for the purpose of remitting the proceeds to the Defendant, who was then in “England. He said it was for the purpose of enabling “her to return to Canada..

Question:—“Did the said François Baby act as the general agent of the said Defendant during her absence in “England, in managing her affairs and remitting her money?

Answer:—I understood that he was her general agent.

Question:—Did you or not understand from the said “Baby that it was at the Defendant’s request that he applied to you to endorse the note in question ?

Answer :—“ I did, he told me that he was desired by Mrs. Selby to apply to me to procure for her the sum, or thereabouts, specified in the said note, and I could not make it convenient by any other means than by endorsing the said note for her or for her agent. If I had not understood that the note was for Mrs. Selby, I would never have endorsed it.”

Extract from deposition of F. Baby :—

“ The note upon which the present action is brought was made and signed by me as agent of the Defendant, and I applied to Mr. Samuel Gerrard, as the friend of the Defendant, and a person to whom the Defendant had directed me to apply for advice in her matters, in case of need, who endorsed it. I discounted it in the Bank. During a portion of the year eighteen hundred and thirty seven the Defendant was absent in Europe, and during that absence I was her general agent, receiving her rents, paying her debts, and remitting money to her. The proceeds of the note in question were applied by me for the benefit of the Defendant, either in the payment of her debts, or by being remitted to her by me. She returned during that year.

“ During my agency I drew and endorsed a number of notes as agent of the Defendant, and to her knowledge and with her consent.

Question :—“ While the Defendant was in England in what way did she obtain money from you as her agent. Did you remit, or did she draw upon you?

Answer :—“ It was done through the City Bank, but I cannot now swear as to the manner. I believe she drew one draft on me for five or six hundred pounds through the City Bank, which I presume may be seen by their books.

“ My memory will not enable me to swear positively as to the manner in which the Defendant obtained money

" from me during her stay in Europe, nor can I speak positively as to the conversation with M. Gerrard, nor can I say that I got that amount from him ; all I can say positively is that I obtained money for the Defendant through Mr. Gerrard, nor can I say positively the exact manner in which I employed the money I so got, but I swear positively I employed it for the Defendant.

CROSS EXAMINED.

Question :—“ Had you a written power of Attorney from the Defendant to act as her Agent ?

Answer :—“ I must have had one, and I think it was Mr. Lukin the Notary who passed it, I was the Agent of the Seigniory, *La Salle*, belonging to the Defendant, and for that purpose I required a written power of attorney.

RE-EXAMINED.

“ I admit that I did sign promissory Notes in the name of the Defendant as her agent, and, likewise, that most of them were discounted at Montreal ; of this I am positive.”

.....

The power of Attorney, from the Defendant, in her qualities mentioned in the plea, before Lukin, N. P., to François Baby, of the 3d October 1835, gives him full power to act in her absence in Europe for the following purposes :

1. To manage all matters relating to the Seigniory La Salle ; to lease, concede, sell, exchange or surrender any lands in said Seigniory, and in other Seigniories as he might see fit, and to exercise all her feudal rights ; to sell the Seigniory of La Salle, and all other real estate, except certain houses, and to execute any deeds necessary for any of the said purposes.

2. To sue for, recover and discharge all arrears of rents, and all debts of every kind, to receive from the Receiver General, and discharge, all arrears due as salary or allowance to the late George Selby, to compound or arbitrate touching any debts, to institute, defend, discontinue and execute all such actions and judgments ; to inscribe *en faux* ; to refer the decisory oath, &c., " and generally to do all " and every other acts, deeds, matters or things what- " soever in and about the said property, estate and affairs " of her the said Marguerite Baby, as amply and effectually " to all intents and purposes, as she, the said Marguerite " Baby, could do or have done in her own proper person, if " these presents had not been made."

Extract from notarial power of Attorney from Defendant to Edmund Henry, of the 3d October 1835, filed by Defendant at enquête :

" Whereas the said Marguerite Baby, being about to de-
" part for Europe, by a certain procuration passed this day,
" &c., did appoint François Baby &c., her Attorney for the
" management of her Estates, property and affairs ; and
" whereas in the management of the said Estates, property
" and affairs, it may be necessary that the said François
" Baby borrow money ; and whereas, in order to facilitate
" the borrowing of the said money in that behalf, it appears
" to the said Marguerite Baby adviseable that she should
" especially empower some person in her name to hypo-
" thecate or mortgage her Estates and property : now therefore,
" &c." power is given to Edmund Henry to mortgage all
her lands in Lower Canada, to such person or persons " as
" may lend, pay or advance to the said Baby for the pur-
" poses aforesaid, " any sum of money not to exceed how-
ever in the whole £2500, currency, and to bind her to repay
the same.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : **BOWEN**, Juge-en-Chef, **MEREDITH**, et **MORIN**, Juges.

No. 1375, { **WHITE** *Demandeur.*
 vs.
 ATKINS, *Défendeur.*
 et
 SMITH, et al., *Opposants.*

Jugé :—Qu'une donation de meubles contenue dans un contrat de mariage ne requiert point tradition. Held :—That a donation of moveables made by a contract of marriage does not require an actual delivery.

Jugement rendu le 1er jour de Mars 1855.

Dans cette cause une exécution avait été émanée contre le Défendeur, et certains meubles avaient été saisis comme lui appartenant. Louisa Smith, l'épouse du Défendeur, séparée de lui quant aux biens par son contrat de mariage, réclamait la propriété des effets ainsi saisis, alléguant que donation lui en avait été faite au moyen de son contrat de mariage.

Le Demandeur contesta cette opposition au moyen d'une défense en droit, fondée sur ce que l'Opposante n'alléguait point avoir eu la tradition des effets à elle donnés par son dit contrat de mariage. La question soumise à la cour, au moyen de cette plaidoirie, était de savoir si la tradition était nécessaire pour opérer translation de propriété dans le cas d'une donation faite par contrat de mariage. L'Opposante soutenait que cette tradition n'était point nécessaire. (1) La cour adoptant cette prétention de l'Opposante renvoya la défense en droit. Le jugement est comme suit :

The Court, &c. :—“ Considering that the first two reasons assigned in support of the said demurrer are unfounded in law, in as much as “*tradition*,” delivery, is not necessary with respect to “*donations* made by marriage contracts, the maxim “*donner et retenir ne vaut*” being

(1) Ricard, *Donations*, page 236.

inapplicable to such donations : Considering that the third reason assigned in support of the demurrer is not justified by the allegations contained in the said Opposition of the said Louisa Smith ; doth in consequence overrule the said demurrer with costs."

HOLT et IRVINE, Proc. du Demandeur.

STUART et VANNOVous, Proc. de l'Opposante.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : Bowen, Juge-en-Chef, MEREDITH, Juge.

No. 1554. { FERGUSON,..... *Demanderesse.*
vs.
GILMOUR,..... *Défendeur.*

Jugé :—Qu'un Demandeur n'a pas le droit de demander une contrainte pour mépris de cour, contre un Défendeur qui a été condamné à payer des frais sur des procédures incidentes ; mais que tel Demandeur a droit de demander une exécution durant la litespendance du procès.

Held:—That a Plaintiff has no right to demand an attachment for contempt against a Defendant who has been condemned to pay cost upon an incidental proceeding, but that such Plaintiff is entitled to demand an execution during the pendency of the case.

Jugement rendu le 1er jour de Mars 1855.

Dans cette cause, un jour avait été fixé pour un procès par jury, mais au jour ainsi fixé, le Défendeur fit motion pour remettre la cause, parce que un de ses témoins était absent. Cette demande lui fut accordée à la condition de payer à la Demanderesse les frais qu'elle avait encourus pour faire assigner les jurés et ses témoins. Le Défendeur s'étant refusé ensuite à payer les frais en question, la Demanderesse s'adressa à la cour pour obtenir une contrainte par corps contre le Défendeur, en raison de ce refus, il lui fut objecté qu'elle n'avait pas droit d'obtenir contre le Défendeur une contrainte pour mépris de cour, ainsi que cela se pratique en Angleterre, mais que, d'après la pratique française, elle avait droit de demander un exécutoire pour

les frais encourus sur une procédure incidente, (1) subéquemment la Demanderesse fit motion pour qu'il émanât, contre le Défendeur, une exécution pour les frais en question, ce qui lui fut accordé.

HOLT et IRVINE, pour la Demanderesse.

OKILL STUART, pour le Défendeur.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : STUART et PARKIN, Juges Assistants.

No. 829, { Tessier, Demandeur.
vs.
Pelletier, Défendeur.

Jugé :—Que les allégés contenus dans un affidavit pour *Capias*, énumérés et reproduits plus bas, sont suffisants.

Held :—That the allegations contained in an affidavit for a *Capias*, enumerated and detailed, infra, are sufficient.

Jugement rendu le 31 Décembre 1855.

Dans cette cause le Demandeur avait commencé son action par un writ de *Capias* contre le Défendeur. En son affidavit, après avoir énoncé les causes d'action, il alléguait ce qui suit : "et le dit déposant dit de plus, qu'il est bien informé d'une manière croyable, qu'il a toute raison de croire, et qu'il croit en son âme et conscience, que le dit Pierre Chrysologue Pelletier est sur le point de receler ses biens, dettes et effets, dans le but de frauder ses créanciers, et notamment les dits Ives Tessier et Augustin Théophile Ledroit, et que sans le bénéfice d'un writ ou bref de *Capias ad respondendum*, contre la personne et le corps du dit Pierre Chrysologue Pelletier, eux, les dits Yves Tessier et Augustin Théophile Ledroit, perdront leur créance sus-dite, et souffriront des dommages ; et le dit déposant dit de plus que ses raisons de croire que le dit Pierre Chrysologue Pelletier recèle ses biens, dettes et effets, dans le but de frauder

(1) *Serpillon, Code Civil*

ses créanciers, et notamment les dits Tessier et Ledroit, résultent de ce que le dit Pierre Chrysologue Pelletier est aujourd'hui dans un état complet de faillite et déconfiture, qu'étant ainsi en faillite et déconfiture le dit Pierre Chrysologue Pelletier a vendu et livré, subrepticement pour ses créanciers, tout son fonds de magasin, qu'il est endetté en une somme excédant six cents louis courant, qu'il retire et perçoit ses dettes ou créances, qu'il empoche les dits argents, qu'il refuse de les payer ou remettre à ses créanciers disant qu'il garde ces sommes d'argent comme une autre corde à son arc, et pour l'aider à se protéger, qu'il retire aussi de ses débiteurs des billets promissoires pour des montants considérables, qu'il garde par devers lui, et qu'il refuse même d'exhiber à ses créanciers sous prétexte qu'il faut qu'il se protège contre ses créanciers, que le dit Pierre Chrysologue Pelletier soustrait à la connaissance de ses créanciers tous les moyens qu'ils pouvaient avoir pour connaître les noms de ses débiteurs, et des sommes d'argent qui lui sont dues, et dans un grand nombre de cas étant à ses créanciers l'avantage d'arrêter et saisir en main tierces ce que ses débiteurs peuvent lui devoir, en prenant des billets promissoires que le déposant à raison de croire sont payables à l'ordre du dit Pierre Chrysologue Pelletier ; que les immubles hypothéqués en faveur des sus-dits créanciers pour la sûreté des créances sus-dites sont insuffisants pour payer les sus-dites créances ; que le dit Pierre Chrysologue Pelletier a déjà été poursuivi et arrêté par corps sous bref de *Capias* par quelques-uns de ces créanciers, savoir, dans le cours du présent mois d'octobre.

Le déposant affirme de nouveau qu'il a toute raison de croire, qu'il croit en son âme et conscience, et qu'il est informé d'une manière croyable, et affirme, que le dit Pierre Chrysologue Pelletier recèle ses biens, dettes et effets, dans l'intention de frauder ses créanciers, notamment les dits Yves Tessier et Augustin Théophile Ledroit."

Le Défendeur fit motion pour faire mettre de côté le writ de *Capias* pour les raisons qui suivent :

1o. Parce que l'affidavit sur lequel le bref de *Capias ad respondendum* en cette cause est émané, ne contient pas les allégués voulus par le statut fait et pourvu en pareil cas.

2o. Parce qu'il n'est pas allégué dans le dit affidavit, que les Demandeurs avaient raison de croire que le Défendeur avait caché ses biens et effets avec intention de frauder les Demandeurs, et que l'omission de cet allégué rend le dit affidavit illégal et insuffisant pour autoriser l'arrestation du Défendeur.

3o. Parce que les Demandeurs n'allèguent spécialement aucune raison suffisante pour justifier leur croyance que le Défendeur était sur le point de cacher ses effets dans l'intention de les frauder.

4o. Parce que quoique le dit affidavit soit basé sur les informations de tierces personnes, les dits Demandeurs n'ont point donné, dans le dit affidavit, les noms des dites personnes, contrairement à la loi, et à la jurisprudence établie en pareil cas.

5o. Parce que les dits Demandeurs ne jurent pas positivement dans le dit affidavit, que les faits sur lesquels ils basent leur croyance sus-dite sont vrais et bien fondés.

6o. Parce que le dit affidavit est irrégulier et insuffisant et que le dit bref de *Capias ad respondendum* a été émané illégalement.

L'affidavit est jugé suffisant, et la motion pour annuler le *Capias* est rejetée.

Tessier pour le Demandeur.

Bossé et Caron pour le Défendeur.

SUPERIOR COURT.—QUEBEC.

Before **BOWEN**, Chief-Justice, **MEREDITH**, and **MORIN**,
Justices.

No. 1066. { **BERNIER, et al.**..... *Appellants.*
 { and
 { **LANGLOIS,**..... *Respondent.*

Held:—That freight is the mother of wages, and that if during a voyage the vessel becomes a total loss the seamen cannot recover wages, and that consequently the liability of a third party to pay them their wages will cease. (1).

Jugé:—Que les matelots n'ont droit à des gages que quand le vaisseau a gagné du fret, et que si durant le voyage le vaisseau est totalement perdu les matelots n'ont point droit à leur salaire, et que dans tel cas l'obligation contractée par un tiers de payer les gages est éteinte.

Judgment rendered the 26th day of June 1855.

This was an appeal from a judgment rendered in the Circuit Court, at Quebec, by Mr. Justice Power, on the 20th day of January 1855, in an action by the Respondent against the Appellants, the judgment of the Circuit Court was in favor of the Respondent; the following are the facts of the case as exhibited by the pleadings and the evidence.

The Respondent instituted his action against the Appellants for the recovery of the sum of £22 17 currency, alleged to be due him for the balance of his wages as mariner, from the 1st. of July to the 1st. of December 1853, on a voyage in the ship Sir Allan McNab, from Quebec to Liverpool, in England, and to return the same year, at the rate of £5 10 per month, upon the express condition that if Bernier, the master, did not see fit to return to Canada, with the said vessel, in that case he should be bound to procure to the Respondent a berth, as mariner, on board of a vessel returning to Canada, in the autumn of the year 1853, and in case the said master should be unable to place the Respondent as mariner on board of a vessel returning to Canada, then he would be bound to procure to the Respondent a passage at his costs: as the whole had been agreed upon by deed before Glackemeyer, and another, Notaries, on the fourth of July

(1). The contract alleged in the cause was entered into previous to the passing of "The Merchant Shipping Act, 1854" 17th and 18th Vic. Cap. 104.

1853; to which deed the Appellants, Bernier, as master, and Dubord as owner, of the *Sir Allan McNab*, were parties, obliging themselves jointly and severally. The Respondent declared that he had well and truly performed the said voyage, but that the Appellants had neglected to provide a passage for him to Quebec, by means whereof he was obliged to return to Quebec without receiving any wages, and to pay his expenses up to the 1st day of December, 1853, the day of his arrival in Quebec.

The Respondent then concluded for judgment against the Appellants, jointly and severally ; to this action the Appellants pleaded the general issue, and an exception, by which latter plea, after setting forth the agreement above stated, they alleged that the said Bernier, having sailed from Quebec with the *Sir Allan McNab*, arrived at his destination, at Liverpool, in England, in the month of August 1853, that having sold the *Sir Allan McNab*, he procured for the Respondent a berth, as mariner, on board a vessel returning to Canada that autumn. The Appellants further pleaded payment of all wages due the Respondent for services on board the said *Sir Allan McNab*, except as to 1s. 10, which they tendered. It was proved by the evidence in the cause that the *Sir Allan McNab* having sailed from Quebec in the month of July arrived at Liverpool in the beginning of August, after a voyage of twenty four days ; that the *Sir Allan McNab* having been sold, the said Bernier, in compliance with the covenants and stipulations contained in the contract above mentioned, had procured for the Respondent a berth on board of a vessel called the *Annie Jane*, coming to Canada, and that the Respondent, on the 20th day of August 1853, had actually shipped on board of that vessel at the same rate of wages ; and that the said vessel had sailed from Liverpool for Canada, with the Respondent on board, but that the said vessel, on her voyage out, had suffered shipwreck, and become a total loss. It was further proved that the Respondent had been saved and had returned to

Liverpool, from which place he had sailed on board of the Grecian which brought him to Baltimore, and that he reached Quebec about the end of November. His passage on board the Grecian had been paid in England, but it was not ascertained by whom, this point, however, was immaterial to the cause.

At the argument of the case in the Circuit Court the Respondent claimed wages, 1stly, for his services from the 1st July to the 20th of August 1853 on board the *Sir Allan McNab*, 2ndly, from the 20th August to the 1st day of December 1853, day of his arrival at Quebec.

The Appellants contended that they were bound to pay wages to the Respondent for his services on board of the *Sir Allan McNab* up to the 20th August 1853, and that a judgment ought to be rendered against them for a small sum as a balance of wages for such services, they having failed to prove all the payments as alleged, but that as to the surplus of wages from the 20th August they were not liable having fulfilled their contract by procuring for the Respondent a berth on board the *Annie Jane*; that from that day they were relieved from all liability incurred by their contract, except as to the payment of what might be earned by the Respondent on board the *Annie Jane*.

They maintained that the *Annie Jane* having been wrecked, and having become a total loss, no freight had been earned, and no wages were due to her seamen, and that, consequently, the Respondent had no action for wages from the 20th August 1853, he being in the condition of a shipwrecked mariner whose vessel was totally lost.

Such was the point submitted to the Circuit Court. On the 20th January 1855, a judgment was rendered by Mr. Justice Power, as stated above, for the whole amount of wages to the first of December 1853, deducting however the payments proved; from this judgment, Bernier and Dubord appealed to the Superior Court.

The grounds of their appeal were that the judgment appealed from was erroneous ; because the Respondent himself, by his own evidence, had established the fact that the Appellant, Bernier, in compliance with the terms of his contract, had procured for the Respondent a berth on board of another vessel, as mariner, at the same rate of wages as the Respondent had originally shipped for, to wit, on board the Annie Jane, then bound on a voyage to Quebec ; because he had also proved that he signed articles and shipped on board of the Annie Jane as mariner and proceeded with her on her voyage to Quebec ; because the Appellants had further proved that the Annie Jane, having so proceeded on her voyage, had suffered ship-wreck and become a total loss ; and because by reason of such total loss no freight had been earned and the Respondent as seaman was not entitled to wages.

The cause having been heard the Superior Court were unanimous in reversing the judgment, thereby adopting the principle invoked by the Appellants, that, by reason of the total loss of the Annie Jane, the Respondent was not entitled to wages after the 20th August 1853.

The judgment of the Superior Court is as follows :

The Court, &c. :—“ Considering that by the agreement of the 4th July 1853, the Respondent, Plaintiff in the Court below, had engaged as a mariner for a voyage in the vessel called the “ Sir Allan McNab,” from the port of Quebec to Liverpool, and to return to Quebec, which engagement formed the principle agreement between the parties ; that it was, however, agreed that if the master of the vessel should not think proper to return to Canada with the ship, he should be bound to procure for the said Respondent, together with other seamen engaged according to the said agreement, a berth as seaman on board of a vessel returning to Canada, and to make up the difference of wages, and that in case

the said Master, to wit : Louis B. Bernier, one of the Appellants, and one of the Defendants in the Court below, should not be able to provide a berth for the Respondent, he should be bound to procure a return passage for him at his own cost ; considering that the said Louis B. Bernier has complied with the condition of finding a return berth as seaman for the said Respondent, to wit : on board the vessel called the Annie Jane, on board of which the Respondent has been engaged, and that thus the Appellants have discharged, as well the said condition, as the subsidiary one of procuring a passage for the Respondent, the said Appellants remaining responsible for the difference in the wages ; and considering that this last responsibility did not change the nature of the engagement of the Respondent, and that the Appellants could not be responsible for the difference of wages for the services of the Respondent on board of the Annie Jane, except in the same manner as they would have been responsible for the same services on board the Sir Allan MacNab, and under the same circumstances ; considering that by the shipwreck and loss of the said vessel the " Annie Jane," the Respondent has, by law, lost his return wages ; considering also that the wages of the Respondent up to the time of his engagement on board the " Annie Jane," amounted to £8 9 0 currency, and that the payments on account alleged by the Appellants have not be proved ;—doth reverse the judgment appealed from with costs, and proceeding to render the judgment which ought to have been rendered in the Court below, doth condemn the Appellants, Defendants in the Court below, jointly and severally to pay to the Respondent, the Plaintiff in the Court below, the sum of £8 9 0 currency, for the wages of the said Respondent, Plaintiff, as mentioned in the declaration with interest &c., with costs as in a second class non appealable case of the Circuit Court."

LELIEVRE and ANGERS, for Appellants,
TESSIER, for Respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents : SIR L. H. LAFONTAINE, Juge en Chef, AYLWIN,
DUVAL et CARON Juges.

HALPIN..... *Appelant.*
et

RYAN..... *Intimé.*

Jugé :—Qu'une Inscription en Faux ne peut être maintenue à raison d'une surcharge sans importance, dans l'acte arqué de faux, comme, dans l'espèce, la transformation de "parties," en "party" au moyen de rature et surcharge.

Held :—That an *Inscription en Faux* cannot be maintained against a notarial copy containing a slight alteration or erasure, as in the case submitted, altering the word "*parties*" so as to make it "*party*".

Jugement rendu le 12 Mars, 1855.

L'Appelant était poursuivi devant la Cour Supérieure à Montréal en déclaration d'hypothèque sur une obligation consentie à l'Intimé par James Halpin, frère de ce dernier. L'Appelant obtint la permission de s'insérer en faux contre l'expédition de cette obligation produite au soutien de la demande. La minute compulsée, l'Appelant produisait ses moyens de faux ; le faux allégué par l'Appelant consistait dans la transformation du mot "*parties*" qui se trouvait originairement dans la minute, en celui de "*party*" et ce au moyen d'une surcharge. Copie de cette obligation avait été enregistrée au bureau des hypothèques, et là on trouvait le mot "*party*," tandis que la copie qui portait le certificat d'enregistrement, contenait aussi la même altération. L'Appelant alléguait que ce changement avait été fait après l'exécution et perfection de la dite copie, et après son enregistrement, et sans le consentement du dit James Halpin.

L'inscription en faux fut déboutée le 29 avril, 1854, par la Cour Supérieure "*for want of proof of the material allegations thereof.*"

La question portée en appel, Halpin, s'y vit également débouté de ses prétentions, et la Cour du Banc de la Reine considérant l'altération sans importance, et non susceptible

d'une inscription de faux, confirma le jugement de la Cour Supérieure.

CARTER et KERR, pour l'Appelant.

DEVELIN et DOHERTY, pour l'Intimé.

SUPERIOR COURT.—MONTREAL.

Before **DAY, VANFELSON, and MONDELET**, Justices.

No. 1276. { **VAUGHAN et al..... Plaintiffs.**
 vs
 { **CAMPBELL..... Defendant.**

Held:—That a plea by which it is alleged that a suit has already been brought and decided in a competent foreign tribunal, by the same Plaintiff against the same Defendant, for the same causes of action is a good plea, more especially if it sets up payment of the judgment by the Defendant.

Jugé:—Qu'une défense par laquelle il est allégué qu'une action a déjà été intentée devant un tribunal étranger, par le même Demandeur contre le même Défendeur, pour les mêmes causes d'action, est un bon plaidoyer, et particulièrement si la défense allègue paiement du jugement.

Judgment rendered the 25th October 1855.

Action returnable on the 14th September, 1852, to recover the sum of £500 alleged to be due under three several sub-contracts made between the Plaintiffs and the Defendant, one dated on the 6th September, and the others on the 30th November 1850, for the performance of certain specified works on the extension of the Champlain and St. Lawrence Rail-Road, for which the Defendant was the original contractor.

The Defendant by his first plea alleged, in effect;—That a suit had been instituted by the Plaintiffs against him in the Superior Court of the State of New York, in December 1851, upon the same contracts, and for the same work and damage as were set forth in the declaration, and recited the various allegations made by the Plaintiffs in that action which was brought for \$6290, 75.;—that the Defendant, pleaded to the action, and that a reference was made, by consent of parties, of all the matters in contestation to certain arbitrators named;—that the award of arbitrators on the 12th May 1852, awarded to the Plaintiffs the sum of \$4302, 59. for all the matters and things in that cause and in this contained;—the immediate homologation of the award by the Court, and the payment by the Defendant of the sum mentioned in the award, with interest, as per

receipt produced.—To this plea the Plaintiffs demurred and the parties were heard.

DAY, Justice :—The question raised by the pleadings is simply this: is a foreign judgment a bar to an action brought by a Plaintiff for the same cause here? In France by the Ordinance of 1629 Art., 121, it was declared that judgments between Frenchmen in a foreign country should not deprive them of the right of bringing the matters in contestation between them before à French Court, *nonobstant les jugements, nos sujets, contre lesquels ils auront été rendus, pourront de nouveau débattre leurs droits comme entiers par devant nos officiers.*"

The law was founded on circumstances peculiar to the times. Privileges and exclusions were then the rule in Europe. It was a local law, regulating what is in fact matter of National Common Law. We think foreign judgments are to be taken, *prima facie*, as settling the rights of parties; —that the public law of England is applicable to this case and not the local law; and that the exception of *res judicata* by reason of the judgment of a competent, although a foreign tribunal, is a good plea in bar of the action. The Plaintiffs got their judgment in a tribunal chosen by themselves; that judgment is alleged to have been carried into effect, or at all events paid, and they cannot come here to raise the same points over again. This is the doctrine laid down by Story, Kent and other eminent writers, and the Court adheres to it. (1).

JUDGMENT. —“ Considerig the exception by the Defendant in the said cause firstly pleaded, and that the Defendant by reason of the foreign judgment, and of others the matters and things therein alleged and set forth, and by law, is entitled upon due proof thereof to obtain the conclusions by him therein taken, doth dismiss the said answer of the Plaintiffs in the nature of a demurrer, with costs.”

BAGLEY and ABBOTT, for Plaintiffs.

ROSE and MONK, for Defendant.

(1) Story, *Conflict of Laws*, Sect. 598:—2. Kent, *Sect. 37*, pp. 119-120, 5th Edit. and cases there cited.

COUR SUPÉRIEURE.—QUÉBEC.

Présents : BOWEN, Juge en Chef, MORIN et BADGLEY, Juges.

No. 1198. { Motz,.....*Demandeur,*
 vs.
 MOREAU, *ès qualités*,.....*Défenderesse.*

Jugé :—lo Que tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et que tous les actes faits par un second tuteur sont nuls;

2o Qu'un inventaire fait sans y appeler le premier tuteur est nul;

3o Que si le subrogé tuteur qui a comparu à tel inventaire, est encore mineur, l'inventaire est nul;

4o Que l'huissier qui a prisé les effets portés à l'inventaire, doit être asservié, à peine de nullité de l'inventaire;

5o Que des inexactitudes, de fausses évaluations, des récels dans un inventaire, le rendent nul, et constituent en fraude celui qui l'a fait;

6o Que toutes transactions, quittances et décharges intervenues entre tel tuteur et des mineurs devenus majeurs, ayant pour base tel inventaire incorrect et frauduleux, sont nulles de plein droit;

7o Que des transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de comptes et sans production de pièces justificatives, sont nulles de plein droit;

8o Que l'action rescissoire, dans pareil cas, ne se prescrit pas par dix ans, lorsqu'il y a dol et fraude;

9o Qu'en l'absence de registres, l'état civil d'une personne peut être prouvé par les dires de ses parents et par témoins.

Held :—lo That so long as a first tutorship exists, a second cannot take place, and that acts made by a second tutor are null;

2o That an inventory made without calling the first tutor is null;

3o That if the *subrogé tuteur* who has appeared at an inventory, is still a minor, the inventory is null;

4o That the bailiff who has estimated the chattels mentioned in the inventory, must be sworn, if not, the inventory is null;

5o That inaccuracies, false valuations, omissions in an inventory make it void, and render the one who has made it guilty of fraud;

6o That all transactions, acquittances and discharges which have taken place betw. en a tutor and minors who have become of age, founded upon such incorrect and fraudulent inventory, are null *de plano*;

7o That transactions which have taken place between a tutor and minors who have become of age, without a faithful inventory being made, without accounts being rendered and without production of vouchers, are void *de plano*;

8o That the action *rescissoire*, in such a case, is not prescribed by ten years, when there is deceit and fraud;

9o When there is an absence of registration, the civil *status* of a person can be proved by the sayings of his parents and by witnesses;

Jugement rendu le 5 septembre, 1855.

L'action du demandeur avait pour objet de réclamer sa part dans la succession de feu Christiana McPhee, sa mère, tant de son chef que du chef de William Andrew Motz, son frère, et de demoiselle Catherine Motz, sa sœur, dont les droits lui avaient été cédés. Cette action était dirigée contre la dame Henriette Moreau, veuve Joseph Carrier, poursuivie en son propre nom et en sa qualité de tutrice à

ses enfants, comme étant en possession des biens réclamés, à l'effet de lui faire rendre compte, de la forcer à procéder à faire inventaire, et de plus à l'effet d'opérer un partage et licitation. L'action avait aussi pour objet de demander l'annulation de plusieurs actes que le demandeur anticipait devoir lui être opposés, entr'autres un inventaire, diverses cessions, quittances et transactions intervenues entre les héritiers Motz et feu Joseph Carrier, leur beau-frère.

Voici les principaux allégés de la demande :—

Le demandeur allègue dans sa déclaration que la défenderesse, dame Henriette Moreau, était commune en biens avec feu Joseph Carrier, de Québec, marchand, son époux ; qu'elle est sa légataire usufruitière, et tutrice des enfants mineurs issus de son mariage avec le dit Joseph Carrier, et encore tutrice à la substitution créée par le testament de son mari, et c'est en ces diverses qualités qu'il dirige son action contre elle. Il met en cause Joseph Carrier, médecin, de Québec, comme ayant un intérêt dans les biens en contestation. Il allègue, que du mariage de feu John Motz et dame Christiana McPhee, sont nés trois enfants, savoir : lui, James Motz, le demandeur, William Andrew Motz, et feue demoiselle Catherine Motz ;

Que John Motz, son père, est décédé à Québec le 1er octobre, 1819 ;

Que, par son testament du 12 juillet, 1814, (Scott, notaire,) le dit John Motz a institué la dame Christiana McPhee, son épouse, sa légataire universelle ;

Que le 7 décembre, 1819, la dame Christiana McPhee, veuve John Motz, a épousé en secondes noces le dit feu Joseph Carrier, de Québec, alors boucher ;

Que de ce dernier mariage, est né Joseph Carrier, fils, médecin, mis en cause comme susdit ;

Que la dite dame Christiana McPhee est décédée le 14 avril, 1829 ;

Que, par son testament, en date du 24 décembre, 1828, (Panet, notaire,) la dite dame Christiana McPhee, donna l'usufruit de ses biens, meubles et immeubles, à Joseph Carrier, son époux, sa vie durant, et en léguua la propriété, par portions égales, un cinquième à Joseph Carrier, son époux, un cinquième à Joseph Carrier, son fils, un cinquième à James Motz, un cinquième à William Andrew Motz et un cinquième à Catherine Motz ; ces trois derniers enfants issus de son premier mariage ;

Que, lors du décès de la dame Christiana McPhee, le dit Joseph Carrier, son époux, s'est mis en possession de tous les biens, meubles et immeubles, laissés par elle ;

Que la succession de la dame Christiana McPhee valait, en mobilier, 10,000 livres courant, et en immeubles, propres, acquets et conquets, une autre somme de 10,000 livres ;

Que le 6 décembre, 1837, demoiselle Catherine Motz est décédée, *ab intestat*, laissant pour héritiers et représentants, ses frères, James et William Andrew Motz ;

Que, par acte fait à Buffalo le 8 mars, 1852, William Andrew Motz a transporté au demandeur, James Motz, ses droits dans la succession de John Motz, son père, de Christiana McPhee, sa mère, et de demoiselle Catherine Motz, sa sœur, avec en outre la somme de £200, assurée au dit William Andrew Motz par un don gratuit consenti par Christiana McPhee, sa mère, et le dit feu Joseph Carrier, le 17 juillet, 1820, (Scott, notaire) ;

Que cet acte de transport a été déposé au greffe de Pettinger, notaire, le 24 avril, 1852, accepté par le demandeur, le 21 mai, 1852, et signifié à la défenderesse le même jour ;

Que le dît feu Joseph Carrier n'a jamais fait faire un bon et loyal inventaire des biens dépendants de la succession de fene Christiana McPhee, et n'en a jamais rendu compte aux mineurs Motz, James, William Andrew et Catherine ;

Que le 23 septembre, 1823, le dit Joseph Carrier et la dite dame Christiana McPhee firent nommer Lewis Harper tuteur et John Kerry subrogé-tuteur aux mineurs Motz ;

Que le 21 août, 1830, le dit Joseph Carrier se fit nommer tuteur au dit William Andrew Motz et à demoiselle Catherine Motz, sans avoir au préalable fait destituer de sa tutelle le dit Lewis Harper, alors résidant à Québec et en possession de son dit office de tuteur, et fit nommer comme subrogé-tuteur le demandeur, James Motz, alors encore mineur ;

Que cette élection de tuteur fut obtenue par dol et fraude, et dans le dessein d'accaparer les biens des mineurs Motz ;

Que le dit Joseph Carrier, en sa qualité de gardien, de tuteur ou pro-tuteur des mineurs Motz, s'est immiscé dans l'administration de leurs biens, et ne leur en a jamais rendu compte, mais leur a fait signer divers actes de règlements et transactions, ayant pour objet de les dépouiller de leurs biens, desquels actes le demandeur requiert l'annulation ;

Que le 27 avril, 1831, devant Panet, notaire, le dit James Motz, demandeur, fit cession au dit Joseph Carrier, son beau-père, de tous ses droits mobiliers et immobiliers dans les successions de feu John Motz, et de feuée dame Christiana McPhee, ses père et mère, à la charge par le dit Joseph Carrier de payer les dettes des dites successions ;

Que ce transport fut fait pour la somme de £505. 6s. 3d., que le demandeur reconnut avoir reçue du dit Joseph Carrier ;

Que cet acte de cession est nul, parce qu'il y a lésion de plus d'autre moitié dans le prix des immeubles cédés ; parce que le dit Joseph Carrier n'avait jamais rendu compte au dit James Motz, et ne pouvait transiger avec lui légalement ; parce que le prix de cette transaction était basé sur des calculs faux et erronés, entre un tuteur et son pupille, sans

reddition de compte, sans production de pièces justificatives et sans inventaire : c'est pourquoi il demande l'annulation de cet acte.

Le dit demandeur allègue de plus, qu'un pareil acte de transport a été consenti le 7 décembre, 1833, (Panet, notaire,) par son frère William Andrew Motz au dit Joseph Carrier, aux mêmes termes et conditions, et, comme cessionnaire de son frère, il demande l'annulation de cet acte pour les causes ci-dessus énumérées.

Le demandeur offre par sa déclaration de tenir compte des sommes reçues par lui et son frère.

Le dit demandeur allègue de plus, que, par acte devant Panet, notaire, en date du 4 juillet, 1839, le dit Joseph Carrier dressa un prétendu compte de ce qu'il devait à la succession de feu demoiselle Catherine Motz, décédée depuis peu, duquel compte le dit demandeur demande l'annulation, parce qu'il est informe, illégal et incorrect, et n'a pas été accompagné de pièces justificatives..

Le dit demandeur demande de plus l'annulation d'un acte d'acceptation de ce compte par son frère William Andrew Motz, en date du 4 juillet, 1839, devant Panet, notaire.

Le dit demandeur allègue de plus la passation d'un acte de règlement et arrêté de tous comptes, en date du 30 avril, 1841, devant Panet, notaire, entre le dit demandeur et le dit Joseph Carrier, contenant une acceptation de la reddition de compte de la succession de feu demoiselle Catherine Motz, et une quittance : de cet acte le demandeur, pour les mêmes raisons, demande également l'annulation.

Le demandeur allègue aussi que le dit Joseph Carrier, dans la vue de frauder les mineurs Motz, leur a tenu caché un certain acte de don gratuit en leur faveur, en date du 17 juillet, 1820.

Il allègue encore que le 31 août, 1830, devant Panet, notaire, le dit Joseph Carrier, tant en son propre nom comme commun en biens avec dame Christiana McPhee, que comme son légataire en usufruit et en propriété, pour un cinquième, que comme tuteur à Joseph Carrier, son fils mineur, issu de son mariage avec la dite dame Christiana McPhee, et à William Andrew Motz, et Catherine Motz, sus-nommés, légataires en propriété, chacun pour un cinquième, dans la succession de leur mère, en présence du demandeur, aussi légataire pour un cinquième, dans la succession de sa mère, et subrogé-tuteur des dits William Andrew Motz, et Catherine Motz, fit procéder à l'inventaire de tous les biens dépendants de la communauté de biens qui avait existé entre lui, le dit Joseph Carrier, et la dite dame Christiana McPhee ;

Que cet inventaire est nul, parce qu'il n'a pas été fait en présence du dit Lewis Harper sus-nommé, tuteur des mineurs Motz et seul légitime contradicteur ; parce que la qualité de tuteur prise par le dit Joseph Carrier, était une qualité usurpée ; parce que le dit demandeur agissant comme subrogé-tuteur, ne l'était pas de fait, et avait été induit en erreur à cet égard par le dit Joseph Carrier, parce que le dit demandeur était alors mineur, et sous la puissance du dit Joseph Carrier ; parce que cet inventaire est incomplet, incorrect et faux ; parce que dans icelui le dit Joseph Carrier a énuméré, comme faisant partie de la communauté, des propres et des acquets de la dite dame Christiana McPhee, et n'a pas tenu compte à la succession de la dite Christiana McPhee, de plusieurs propres et acquets, aliénés par lui durant la communauté ; pourquoi le dit demandeur demande que le dit inventaire soit déclaré nul et de nul effet, et considéré comme non advenu.

Le dit demandeur allègue de plus, que durant la communauté qui a existé entre le dit Joseph Carrier et dame Christiana McPhee, le dit Joseph Carrier a vendu et aliéné divers immeubles, propres et des acquets de la dite Chris-

tiana McPhee, et en a perçu le prix, en sorte que la communauté qui a existé entre le dit Joseph Carrier et la dite dame Christiana McPhee, en est redevable envers la succession de cette dernière, par forme de remploi de propres et acquets aliénés, et ce au montant de la valeur d'iceux, savoir : au montant de la somme de quatre mille livres courant.

Le dit demandeur allègue de plus, que le dit Joseph Carrier n'a jamais fait faire, comme ci-dessus dit, un bon et loyal inventaire des biens dépendants de la communauté entre lui et la dite Christiana McPhee, en sorte que la dite communauté a été continuée, et que partant les héritiers de la dite dame Christiana McPhee, ont droit de demander, en vertu de la continuation de la dite communauté, la moitié des biens délaissés par le dit Joseph Carrier.

Le dit demandeur allègue de plus, que par acte fait à Québec, devant Scott, notaire, le 17 juillet, 1820, la dite dame Christiana McPhee et le dit Joseph Carrier firent un don gratuit de 200 livres courant à chacun des mineurs Motz, payable à leur âge de majorité, le dit don accepté par leur mère ;

Que par la loi le dit don gratuit est valable pour moitié, savoir : pour la moitié provenant de la dite dame Christiana McPhee ;

Que la dite moitié du dit don gratuit, savoir, 300 livres courant, appartient au dit demandeur, savoir, pour un tiers de son chef, pour un sixième comme héritier de demoiselle Catherine Motz, pour un tiers plus un sixième comme cessionnaire du dit William Andrew Motz, en vertu du transport ci-dessus mentionné, et aussi en vertu d'un transport spécial à lui fait, pour valeur reçue, par le dit William Andrew Motz, le 19 septembre, 1844, avec intérêt légal, depuis leur âge de majorité respectivement, laquelle somme est encore due au dit demandeur, et forme partie des droits et réclamations du dit demandeur ;

Que le 3 octobre, 1831, le dit Joseph Carrier a épousé en secondes noces la dame Henriette Moreau, la défenderesse ;

Que le 2 septembre, 1851, le dit Joseph Carrier est décédé à Québec ;

Que par son testament, reçu devant Panet, notaire, le 21 juin, 1851, le dit Joseph Carrier légua tous ses biens en usufruit à la dite dame Henriette Moreau, sa vie durant, et en propriété à ses enfants, issus de son second mariage, avec substitution ;

Que la dite dame Henriette Moreau, le 17 octobre, 1851, a été nommée tutrice à ses enfants mineurs ;

Que le 14 juin, 1852, la dite dame Henriette Moreau a été nommée tutrice à la substitution créée par le testament du dit Joseph Carrier ;

Que le dit Joseph Carrier, comme susdit, et les défendeurs en cette cause, tant en leurs propres et privés nonns, qu'en leurs qualités respectives, et aussi comme étant aux droits du dit Joseph Carrier, ont appréhendé toute la succession de la dite dame Christiana McPhee, l'ont administrée et gérée, sans faire d'inventaire, ont joui et jouissent encore de tous les biens, meubles et immeubles, dépendants de la succession de la dite dame Christiana McPhee, mère du dit demandeur, et que, quoique de ce souvent requis, ils ont toujours refusé et négligé et refusent encore d'en faire faire inventaire, de rendre compte, de procéder au partage de la dite succession de feuë Christiana McPhee, et de payer au dit demandeur ce qui lui est dû, comme susdit ; au dommage pour le demandeur, intéressé dans la sucession de la dite dame Christiana McPhee, pour trois cinquièmes de la somme de 24,000 livres courant, et comme donataire au montant de 300 livres courant, avec intérêt.

Les conclusions de cette déclaration sont que, par le jugement de la Cour, il soit dit et déclaré :

10. Que le dit acte de transport par le dit demandeur au dit Joseph Carrier, fait et passé devant Panet et son confrère, notaires, à Québec, le 27 avril, 1831, soit rescindé et annulé, et déclaré nul et comme non fait.

20. Que le dit acte de transport par le dit William Andrew Motz au dit Joseph Carrier, fait et passé devant le dit Mtre. Panet et son confrère, notaires, à Québec, le 7 décembre, 1833, soit aussi rescindé et annulé, et déclaré nul et comme non fait.

30. Que le dit prétendu compte abrégé des biens mobiliers et immobiliers de la succession de feu demoiselle Catherine Motz, rendu par le dit Joseph Carrier au dit William Andrew Motz, fait et passé devant le dit Mtre. Panet et son confrère, notaires, le 4 juillet, 1839, ainsi que l'acceptation ou ratification d'icelui par acte, en date du même jour, devant les mêmes notaires, soient dits et déclarés insuffisants, informes, incorrects, incomplets et illégaux, et soient en conséquence rescindés et annulés, et déclarés nuls et comme non faits.

40. Que l'acte de règlement et prétendu arrêté de tous comptes généralement quelconques que le demandeur et le dit Joseph Carrier ont eu ensemble, par acte fait et passé devant le dit Mtre. Panet et son confrère, notaires, à Québec, le 30 avril, 1841, soit aussi rescindé et annulé, et déclaré nul et comme non fait.

50. Que le prétendu inventaire de tous les biens dépendants de la communauté qui a existé entre le dit Joseph Carrier et la dite Christiana McPhee, par acte fait et passé par devant le dit Panet et son confrère, notaires, à Québec, le 31 août, 1830, et les jours suivants, soit rescindé et annulé, et déclaré nul et comme non fait.

En outre qu'il soit dit et déclaré que la communauté de biens qui a existé entre le dit Joseph Carrier et la dite Christiana McPhee, a été continuée et continue encore entre

les représentants légaux du dit feu Joseph Carrier, les défendeurs en cette cause, et le demandeur en cette cause, comme seul et unique représentant, en vertu des actes ci-dessus cités, de la dite Christiana McPhee, sa mère.

Et qu'en conséquence, par le dit jugement de cette Honorable Cour, les dits défendeurs, ès-qualités, soient adjugés et condamnés, dans tel court délai qu'il plaira à cette Honorable Cour ordonner, par devant tel notaire dont les parties conviendront, sinon nommés d'office, en présence des dites parties, et même en leur absence, après avis à elles donné, à procéder à l'inventaire de tous biens, meubles et immeubles, dépendant de la succession de la dite Christiana McPhee, et ensuite à rendre compte fidèle et sous serment au dit demandeur de la gestion et administration, tant par le dit feu Joseph Carrier, que par eux, les dits défendeurs, des dits biens, meubles et immeubles, le tout à l'amiable si faire se peut; sinon en justice, et à défaut par les dits défendeurs de rendre le dit compte sous tel court délai qu'il plaira à cette Honorable Cour fixer, se voir les dits défendeurs, ès-qualités, condamnés purement et simplement à payer au dit demandeur la somme de 24,300 livres, cours actuel, pour tenir lieu au demandeur du reliquat du dit compte, et ce en vertu de la sentence à intervenir sans qu'il en soit besoin d'autre, le reliquat duquel compte, s'il est actif, sera porté en actif dans la masse du partage, et en extinction sur l'actif, s'il est passif, pour la dite succession.

Et en outre, pour voir dire, qu'immédiatement après la clôture du dit compte et fixation du reliquat d'icelui, il sera, à la requête, poursuite et diligence du demandeur, procédé à l'amiable, si faire se peut, sinon en justice, au partage et liquidation des biens et effets de la succession de la dite Christiana McPhee, à l'effet de quoi les immeubles seront tous visités et estimés par experts convenus, ou nommés d'office, lesquels rapporteront l'état, valeur et consis-

tance d'iceux, s'ils peuvent commodément se partager en portions égales aux droits de chacune des parties, et à cette fin il sera procédé :

1o. Sur les rapports qui seront faits par les parties de ce qu'elles peuvent avoir reçu en avancement, sujet à rap.
port.

2o. Sur le dit inventaire et les pièces qui peuvent y être mentionnées.

3o. Sur le partage de la dite communauté pour les biens qui écherront à la succession de la dite Christiana McPhee.

4o. Et enfin sur le rapport des experts touchant les biens propres et acquets à la dite succession, et non compris au partage de la dite communauté ; pour après la dite composition de masse être, les dits biens, divisés en portions égales aux droits de chaque partie, de manière toutefois que les immeubles soient partagés par égales portions, sinon avec soulte, lors desquels rapports et partages, les parties assistées de leurs procureurs pourront faire tels dires, requisisitions et observations qu'elles jugeront convenables, et dans le cas où les dits experts estimeraient que les dits immeubles, ou quelques uns d'eux, ne peuvent se partager en portions égales à leurs droits, voir dire qu'il sera procédé, par licitation, devant cet Honorable Cour, au plus offrant et dernier enchérisseur, en la manière accoutumée sur l'en-chère qui sera à cette fin mise au greffe, lue et publiée en jugement, affichée à la huitaine, mise et apposée aux lieux et endroits nécessaires et accoutumés, et autres avertissements publics et ordinaires, pour après la dite adjudication, être le prix d'icelle partagé comme il conviendra entre les parties.

Et pour en outre les dits défendeurs, ès-qualités, répondre et procéder comme de raison avec dépens, desquels en tout événement, le demandeur sera remboursé comme de frais d'inventaire, de comptes, partage et licitation.

Et soient les dits défendeurs en outre condamnés à payer au dit demandeur la somme de 300 livres courant, en vertu du don gratuit ci-dessus mentionné, avec intérêt et les dépens.

A cette action la défenderesse plaida d'abord par une exception à la forme, qui fut rejetée parce qu'elle avait été produite trop tard ; l'action ayant été rapportée le 10 juillet, 1852, et l'exception filée le 17 septembre de la même année. Dans cette exception l'on reprochait au demandeur d'avoir joint ensemble une action en reddition de compte et une action rescatoire, et aussi une action de dette pour ce qui concernait le don gratuit ; à quoi le demandeur répondait que, prévoyant qu'on pouvait lui opposer l'inventaire et les autres documents illégaux, que, par fraude, Carrier lui avait fait signer, il pouvait en demander la rescission, ainsi qu'il aurait pu le faire par une réplique spéciale ; et que quant à la demande d'une condamnation pour partie du don gratuit cela n'était pas non plus étranger à la reddition de compte, puisque cette somme devait être défafquée de la succession de la dame Christiana McPhee, avant la reddition de compte.

Subséquemment la Cour d'appel refusa de permettre qu'on interjeta appel du jugement déboutant cette exception à la forme.

La défenderesse plaida en outre par une défense en fait, par une défense en droit et par une exception.

Les moyens de droit sont comme suit :

“ Parce que le dit demandeur ne peut demander ni obtenir la rescission des actes et contrats mentionnés dans la dite déclaration, sans offrir au préalable de remettre, rembourser et payer à la dite défenderesse les différentes sommes d'argent que le demandeur allègue par sa déclaration avoir reçues, lui, le dit demandeur, et ceux qu'il représente, et aux droits desquels il prétend être, et

“ qu'il allègue avoir été payées en vertu des dits actes, don
“ il demande la rescission.

“ Parce qu'il n'est pas allégué dans la dite déclaration
“ que le dit demandeur soit dans les dix ans, à compter de
“ la majorité du dit demandeur, et de ceux qu'il repré-
“ sente jusqu'à l'institution de la présente action, pour avoir
“ droit de demander une reddition de compte, tel que men-
“ tionné en la dite déclaration.

“ Parce que le dit demandeur n'allègue pas par la dite
“ déclaration que le dit demandeur soit dans les dix ans, à
“ compter du jour de la passation des dits actes et contrats
“ dont il demande la rescission, jusqu'au jour de l'institution
“ de la présente action.

“ Parce qu'il appert par la dite déclaration que, lors de
“ l'institution de la présente action, il y avait plus de dix
“ ans que le dit demandeur et ceux qu'il représente,
“ étaient majeurs.

“ Parce qu'il appert par la dite déclaration que, lors de
“ l'institution de la présente action, il y avait plus de dix ans
“ que les dits actes et contrats, dont le demandeur de-
“ mande la rescission, ont été passés.”

Les moyens invoqués dans l'exception sont comme suit :

“ Parce qu'il y a plus de dix ans entre âgés et non privi-
“légiés que les différents actes et contrats mentionnés en la
“ dite déclaration, et desquels le dit demandeur demande
“ la rescission, ont été passés, et que partant le dit deman-
“deur n'est pas recevable à en demander la rescission, et
“ que lors de la passation des dits actes, le dit deman-
“deur et ceux aux droits desquels il prétend être, étaient
“ majeurs.

“ Parce que lors de l'institution de la présente action,
“ il y avait plus de dix ans que le dit demandeur et ceux

" qu'il représente dans la dite action, étaient devenus ma-
" jeurs, et que partant le dit demandeur n'est pas recevable
" à demander la rescission des dits actes.

" Parce que l'acte fait et passé à Québec, devant Mtre.
" Scott et son confrère, notaires, le 17 juillet, 1820, et
" mentionné dans la dite déclaration comme étant un don
" gratuit par dame Christiana McPhee et Joseph Carrier, de
" la somme de 200 livres courant à chacun des mineurs
" Motz, et en vertu duquel dit acte, le dit demandeur ré-
" clame une somme de 300 livres courant, a été déclaré
" illégal, nul et de nul effet par un jugement rendu par
" la Cour du Banc de la Reine, pour le district de Québec,
" au terme supérieur, le 20 novembre, 1845, dans une
" cause où le dit demandeur était demandeur, et Joseph
" Carrier, époux de la dite défenderesse, était défendeur,
" sous le numéro 1749, copie duquel jugement est filée avec
" les présentes, et que partant il y a chose jugée quant à
" cette partie de la demande fondée sur le dit don gratuit."

Après une audition sur la défense en droit, la Cour la débouta avec dépens, par jugement du 14 mars, 1853, sur le principe que le demandeur ayant allégué la fraude pouvait n'être pas assujetti à la prescription de dix ans.

A l'exception perpétuelle de la défenderesse, le demandeur répliqua spécialement que cette exception n'était pas fondée :

" 1o. Parce que la défenderesse, Henriette Moreau, ne
" peut légalement invoquer la prescription de dix ans rela-
" tivement à la rescission des actes demandée par le deman-
" deur, attendu que le dit Joseph Carrier avait été le tuteur,
" pro-tuteur et gardien du dit James Motz, et de son frère
" et de sa sœur qu'il représente, et qu'il ne leur avait
" jamais rendu compte, ni produit de pièces justificatives,
" et que d'ailleurs le dit Joseph Carrier, ayant l'usufruit
" sa vie durant de la succession de la mère du dit de-
" mandeur, cette reddition de compte est due par sa suc-

“ cession, dont la dite Henriette Moreau est en possession,
 “ et que telle prescription n'a pu commencer à courir que
 “ du jour du décès du dit Joseph Carrier, arrivé récemment ;

“ 2o. Parce que les actes dont la rescission est demandée
 “ sont entachés de fraude et de dol, et que par la loi, la
 “ fraude et le dol ne prescrivent pas ;

“ 3o. Que l'exception de chose jugée, invoquée contre
 “ la demande de moitié du don gratuit, n'est pas fondée,
 “ en ce que le jugement invoqué ne peut s'appliquer, et ne
 “ s'applique que quant à la moitié due par Joseph Carrier,
 “ laquelle n'est pas demandée, mais ne peut s'appliquer à
 “ la moitié due par Christiana McPhee, par rapport à la-
 “ quelle le dit don gratuit n'est pas nul, icelle pouvant dis-
 “ poser valablement de ses biens par donation en faveur
 “ de ses propres enfants.”

La contestation étant liée entre les parties, elles procé-
 dèrent à la preuve. (1) Le demandeur produisit les pièces
 et documents suivants :—

1o. Tutelle des enfants mineurs de feu Joseph Carrier, 17
 octobre, 1851.

2o. Tutelle à la substitution portée au testament de feu
 Joseph Carrier, 14 juin, 1852.

3o. Extrait mortuaire de feu John Motz, 1 octobre, 1819.

4o. Testament du dit feu John Motz, 12 juillet, 1814,
 Scott, notaire.

5o. Extrait de mariage de Joseph Carrier et Christiana
 McPhee, 7 décembre, 1819.

6o. Testament de dame Christiana McPhee, 24 dé-
 cembre, 1828, Panet, notaire.

7o. Extrait mortuaire de dame Christiana McPhee, 15
 avril, 1829.

(1) Joseph Carrier, fils, ne plaide pas à l'action.

8o. Extrait mortuaire de demoiselle Catherine Motz, 6 décembre, 1837.

9o. Acte de dépôt, par James Motz d'un transport par William Andrew Motz au dit James Motz, et signification à dame veuve Joseph Carrier, née Henriette Moreau, 24 avril, 1852, Petitclerc, notaire.

10o. Acceptation par James Motz du transport à lui fait par William Andrew Motz, et signification à dame veuve Joseph Carrier, née Henriette Moreau, 21 août, 1852, Petitclerc, notaire.

11o. Tutelle des mineurs de feu John Motz et Christiana McPhee, 23 septembre, 1823, Harper, tuteur.

12o. Tutelle des mineurs de John Motz, 21 août, 1830, Carrier, tuteur.

13o. Transport de droits successifs par William Andrew Motz à Joseph Carrier, 27 avril, 1831, Panet, notaire.

14o. Transport de droits successifs par William Andrew Motz à Joseph Carrier, 7 décembre, 1833, Panet, notaire.

15o. Reddition de compte par Joseph Carrier à William Andrew Motz, de la succession de demoiselle Catherine Motz, 4 juillet, 1839, Panet, notaire.

16o. Règlement de compte entre Joseph Carrier et James Motz, pour la succession de demoiselle Catherine Motz, 30 avril, 1841, Panet, notaire.

17o. Inventaire des biens de la communauté entre Joseph Carrier et feue dame Christiana McPhee, 31 août, 1830, Panet, notaire.

18o. Don gratuit par Joseph Carrier et Dame Christiana McPhee aux mineurs Motz, 17 juillet, 1820, Scott, notaire.

19o. Extrait de mariage de Joseph Carrier et dame Henriette Moreau, 3 octobre, 1831.

20o. Extrait mortuaire de feu Joseph Carrier, 5 septembre, 1851.

21o. Testament de Joseph Carrier, 21 juin, 1851, Panet, notaire.

22o. Extrait mortuaire de Lewis Harper, 24 avril, 1831.

23o. Papiers envoyés de St. Jean de Terrenenue, constatant que le certificat de naissance et baptême de James Motz n'a pu y être trouvé, et serait détruit.

24o. Extrait de baptême de demoiselle Catherine Motz, 10 mars, 1817.

25o. Obligation par William Fisher Scott à John Motz, 1 août, 1815, Tétu, notaire.

26o. Jugement en délivrance de legs, No. 526, Joseph Carrier vs. Lewis Harper, tuteur aux mineurs Motz, 8 octobre, 1824.

26o. *bis.* Testament de dame Christiana McPhee, 17 juillet, 1820, Scott, notaire.

27o. Testament de Joseph Carrier, 17 juillet, 1820, Scott, notaire.

28o. Résiliation du don gratuit fait par Joseph Carrier et son épouse, Panet, notaire.

29o. Testament de Joseph Carrier, 24 décembre, 1828, Panet, notaire.

30o. Testament de Joseph Carrier, 18 février, 1830, Panet, notaire.

31o. Vente par dame Christiana McPhee, épouse de Joseph Carrier, à O'Sullivan, 24 décembre, 1828, Scott, notaire.

32o. Vente par Joseph Carrier et son épouse à Godin, 1 février, 1824, Scott, notaire.

- 33o. Vente par Joseph Carrier à Robert Tate, 13 janvier, 1829, Panet, notaire.
- 34o. Transport par Joseph Carrier à dame Scott, 2 avril, 1830, Panet, notaire.
- 35o. Bail par Joseph Carrier à messieurs Carter et Muckle, 13 novembre, 1827, Panet, notaire.
- 36o. Bail par Joseph Carrier à messieurs Carter et Muckle, 1 février, 1830, Panet, notaire.
- 37o. Résiliation du don gratuit par Carrier et son épouse aux mineurs Motz, 17 octobre, 1844, Panet, notaire.
- 38o. Rapport de distribution colloquant Joseph Carrier, dans la cause No. 817, Charles Grant *vs.* George Van-felson, 17 avril, 1830.
- 39o. Rapport de distribution colloquant Joseph Carrier, dans la cause No. 464, Dalrymple *vs.* Scott, 11 juin, 1824.
- 40o. Transport par Frederic Glackemeyer à Joseph Carrier et son épouse, 8 mai, 1828, Têtu, notaire.
- 41o. Bail par Joseph Carrier à Antoine Matte, 5 janvier, 1832, Panet, notaire.
- 42o. Procuration par James Motz à Lelièvre et Angers, 18 novembre, 1843, Petitclerc, notaire.
- 43o. Obligation par William Fisher Scott à John Motz, 16 juin, 1817, Têtu, notaire.
- 44o. Lettre du Capitaine Ingall, 26 novembre, 1853.
- 45o. Lettre de Gillespie, Major de Place à Terreneuve, 27 juin, 1853.
- 46o. Lettre de J. Bazalgette, Colonel et Député Quartier Maître Général à Halifax, 30 juin, 1853.
- 47o. Décharge de John Motz du régiment *Nova Scotia Fencibles*.

48o. Clôture de l'inventaire par Joseph Carrier, tuteur de son fils mineur, Joseph Carrier, 17 septembre, 1830.

49o. Tutelle du mineur Joseph Carrier, fils, 21 août, 1830.

50o. Inventaire de la communauté de biens entre Joseph Carrier et dame Henriette Moreau, 21 janvier, 1852, Panet, notaire.

Le demandeur fit entendre un très-grand nombre de témoins, et émaner plusieurs commissions rogatoires aux fins de prouver les matières de fait alléguées en sa déclaration. La preuve ainsi faite se trouve analysée dans le résumé de la plaidoirie des avocats du demandeur, qui se trouve plus bas ; la défenderesse de son côté produisit quelques documents et entendit plusieurs témoins, dont l'appréciation sera faite en rendant compte de la plaidoirie de son avocat.

Argument de la part du demandeur.

Angers pour le demandeur.

Les principaux documents auxquels le demandeur désire appeler l'attention, sont : pièce No. 6, testament de dame Christiana McPhée, du 24 décembre, 1828 ; pièce No. 9, transport par William Andrew Motz à James Motz ; pièce No. 11, tutelle des mineurs Motz, 23 septembre, 1823 ; pièce No. 12, tutelle aux mineurs Motz, 21 août, 1830 ; pièce No. 13, transport par James Motz à Joseph Carrier, 27 avril, 1831, dont l'annulation est demandée ; pièce No. 14, transport par William Andrew Motz à Joseph Carrier, 7 décembre, 1833, dont l'annulation est demandée ; pièce No. 15, reddition de compte par Joseph Carrier à William Andrew Motz, 4 juillet, 1839, dont l'annulation est demandée ; pièce No. 16, règlement de compte entre Joseph Carrier et James Motz, 30 avril, 1841, dont l'annulation est demandée ; pièce No. 17, inventaire de la communauté entre Joseph Carrier et Christiana McPhee, 31 août, 1830, dont l'annulation est demandée ; pièce No. 18, don gratuit aux mineurs Motz, 17 juillet, 1820 ; pièce No. 24, correspondance de St. Jean de Terreneuve ; pièce No. 26, Carrier vs. Harper, jugement.

Les pièces No. 25, obligation de Scott ; No. 31, vente à Sullivan ; No. 32, vente à Godin ; No. 33, vente à Tate ; No. 34, transport à dame Scott ; No. 38, collocation de Joseph Carrier ; No. 39, collocation de Joseph Carrier ; No. 40, transport par Glackemeyer à Carrier ; No. 43, obligation de Fisher, établissent l'existence de diverses créances dont Joseph Carrier et ses représentants doivent un compte aux mineurs Motz, soit comme formant partie des dettes actives de la communauté entre Joseph Carrier et Christiana McPhee, soit comme étant le prix de propres aliénés, donnant lieu à remplacement.

Les pièces Nos. 35, 36 et 41 sont des baux qui constatent la valeur de l'immeuble situé en la Basse-Ville, Place du Marché.

Les pièces Nos. 26 bis, 27, 29 et 30 sont divers testaments de Joseph Carrier et de Christiana McPhee, au moyen desquels Joseph Carrier donnait de fausses espérances aux mineurs Motz, et les induisait à transiger avec lui à des conditions avantageuses.

Les pièces Nos. 28 et 37, qui sont deux résiliations du don gratuit, démontrent assez les intentions de Joseph Carrier à l'égard des mineurs Motz.

Les pièces No. 11, tutelle du 23 septembre, 1823, aux mineurs Motz, et No. 18, don gratuit, 17 juillet, 1830, contiennent une déclaration par Joseph Carrier et Christiana McPhee, de l'âge de chacun des mineurs Motz, d'après laquelle déclaration, le demandeur, James Motz, aurait été mineur à l'époque de la confection de l'inventaire du 31 août, 1830.

La pièce No. 22 établit que le tuteur Harper vivait encore quand Carrier s'est fait nommier tuteur le 21 août, 1830.

La pièce No. 26 prouve que Joseph Carrier lui-même considérait Lewis Harper comme le tuteur des mineurs Motz, puisqu'il le poursuivit en cette qualité.

La pièce No. 43, qui est une copie de l'inventaire du 31 août, 1830, prouve que cette clôture n'a été faite par Carrier qu'en sa qualité de tuteur à Joseph Carrier, son fils, et non en sa qualité de tuteur aux mineurs Motz. Quant à ces derniers il n'y a jamais eu de clôture d'inventaire.

Telle est la substance des faits principaux, constatés par la preuve littérale. Un grand nombre d'autres documents, énumérés plus haut, servent à établir la qualité et l'état civil des parties, et forment le complément de la preuve littérale.

Quant à la preuve testimoniale, le demandeur prétend avoir prouvé par ses témoins qu'il est né à St. Jean de Terreneuve, dans le mois d'octobre ou novembre, 1810, et que William Andrew Motz, son frère, est né au même endroit, le 26 décembre, 1812, et que conséquemment le demandeur était mineur le 31 août, 1830, lors de la confection de l'inventaire, et le 27 avril, 1831, lors du transport qu'il fit à Joseph Carrier, n'étant parvenu à sa majorité que dans le mois d'octobre ou novembre, 1831 ; que pareillement William Andrew Motz était mineur le 7 décembre, 1833, date du transport par lui fait à Joseph Carrier, n'étant parvenu à sa majorité que le 15 décembre, 1833 ; que John Motz et Christiana McPhee sont venus à Québec avec leurs enfants, James et William Andrew Motz, durant l'été de 1814, avec leur régiment appelé *Nova Scotia Fencibles*, dont le dit John Motz était sergent ; qu'à cette époque John Motz avait déjà beaucoup d'argent, et en prêtait ; qu'il tint une auberge sur le marché de la Haute-Ville, et une autre dans les Casernes, faisant beaucoup d'argent, jusqu'à sa mort, arrivée en octobre, 1819 ; qu'à l'époque de sa mort il pouvait valoir en mobilier, argent et biens-fonds, de £9 à 10,000 ; que toute cette fortune passa entre les mains de sa veuve, qui, deux mois après, épousa Joseph Carrier, qui n'était alors qu'un pauvre garçon boucher ; que Carrier et sa femme continuèrent le négoce de feu John Motz, avec un égal succès, jusqu'à l'année 1829, date de la mort de la

dite dame Christiana McPhee, ayant doublé leur fortune, et valant conséquemment environ £20,000 ; que vers 1826 ils achetèrent la maison de la Basse-Ville environ £3,000, et que l'ayant payée comptant, ils déclarèrent qu'il leur restait assez d'argent pour faire un autre semblable achat ; qu'en 1823 Lewis Harper fut nommé tuteur des mineurs Motz, dont il était l'ami, et prit possession de son office de tuteur, continuant de demeurer à Québec, jusqu'à sa mort, arrivée en 1832 ; que la propriété de la Basse-Ville, estimée par Carrier £2,500, valait £5,000 au moins ; que durant la communauté Joseph Carrier et Christiana McPhee vendirent des propres de cette dernière, au montant de £950 ; que dans son inventaire Joseph Carrier fit estimer les effets par l'huissier Williams, sans qu'il fût assermenté ; qu'un fonds de commerce, qu'il avait en société, ne fut pas inventorié, ni vu, ni prisé, si ce n'est sur la production d'une liste, fournie au notaire par Matte ; que plusieurs effets, entr'autres une montre et une chaîne d'or, ne furent point évalués à plus d'un dixième de leur valeur réelle ; que, lors des transports faits par James et William Andrew Motz, Joseph Carrier ne leur rendit pas compte, ne leur produisit aucunes pièces justificatives, et se vanta de s'être débarrassé de leurs réclamations à bon marché ; qu'en effet, les enfants Motz étaient alors sans aucun moyen, et que Joseph Carrier profita de cette circonstance pour les déposséder de leur patrimoine ; que dans son inventaire Carrier omis entièrement un fonds de commerce qu'il avait en son propre nom dans un hangar et une voûte sur le quai St. André, et aussi le prix des propres de sa femme, aliénés par lui, et plusieurs créances dues à la succession de John Motz, entr'autres par Scott, Pozer, DeGaspé, M'Callum.

Ainsi le demandeur, par sa preuve littérale et testimoniale, prétend avoir établi les points qui suivent :

1o. Nullité de l'inventaire du 31 août, 1830.

2o. Nullité du transport du 27 avril, 1831.

3o. Nullité du transport du 7 décembre, 1833.

4o. Nullité du compte et de la quittance du 4 juillet, 1839.

5c. Nullité du compte et de la quittance du 30 avril, 1841.

Comme ces actes sont les seuls qui soient intervenus entre Joseph Carrier et les mineurs Motz, leur nullité laisse ces derniers dans la position où ils seraient, si ces actes n'eussent jamais été passés.

Les points suivants sont aussi établis :

6o. Minorité de James Motz lors de l'inventaire et du transport, 1830 et 1831.

7o. Minorité de William Andrew Motz lors du transport de 1833.

8o. Nullité de l'inventaire de trois sortes : 1o. Point de légitime contradicteur. 2o. Point de production de pièces.

3o. Omission, recélés, dol et fraude.

9o. Nullité de la reddition de compte, concernant la succession de demoiselle Catherine Motz : 1o. A cause de la non production de pièces. 2o. Parce qu'elle était basée sur un inventaire nul, celui de 1830.—Il y a de plus dans cette reddition de compte une erreur de £20 contre les mineurs Motz.

10o. Il n'y a point eu, il est vrai, continuation de communauté entre Joseph Carrier et les mineurs Motz, mais à défaut d'inventaire, il a laissé confondre en une seule masse les successions de John Motz et de Christiana McPhee, et les biens de sa première et de sa seconde communauté.

11o. Un point de droit incontestable est, que l'on ne doit point avoir égard à la fausse dénonciation de majorité faite par un mineur.

12o. Il est également certain que l'un des deux conjoints ne peut pas légalement exempter le survivant de faire inventaire.

13o. La prescription de dix ans contre l'action rescatoire, ne s'applique pas aux actes nuls de plein droit.

14o. Le tuteur est toujours tenu de rendre compte, et l'action dont il est passible ne se prescrit que par trente ans.

15o. Il est également certain que le compte doit être exact et fidèle, et doit être accompagné de pièces justificatives.

16o. Les quittances ne peuvent pas être assimilées à des transactions, et la prescription de dix ans ne leur est pas applicable.

17o. La prescription de dix ans ne s'applique pas aux actes entachés de dol et de fraude, si ce n'est à compter du jour où le dol et la fraude ont été découverts.

Quatre points principaux sont rendus certains par la preuve testimoniale : 1o. la date de la naissance des mineurs Motz ; 2o. le fait de l'élection de Lewis Harper, comme tuteur ; 3o. la valeur des biens dépendant des successions de John Motz, en 1819, et de Christiana McPhee, en 1829 ; 4o. la valeur de la maison de la Basse-Ville, et celle des propres aliénés ; 5o. le dol et la fraude pratiqués par Carrier à l'encontre des mineurs Motz.

De cette preuve, il résulte : 1o. que James Motz est né en octobre ou novembre, 1810 et William Andrew Motz en décembre, 1812, savoir, le 26 ; 2o. que Lewis Harper fut dûment nommé tuteur à la requête de Carrier ; 3o. que la valeur de la succession de feu John Motz en 1819, était d'au moins £10,000, et que la valeur de la communauté de Joseph Carrier et Christiana McPhee en 1829, était de £10,000 ; 4o. que la valeur de la maison de la Basse-Ville était d'au moins £5,000 ; 5o. que Carrier était coupable

de fraude envers les mineurs Motz, dont les principaux actes étaient, que Williams, l'huissier priseur, n'était pas assermenté ; que Harper, le tuteur des mineurs Motz, n'était pas présent à l'inventaire ; que Carrier s'était fait nommer tuteur par supercherie ; que James Motz était mineur quand il transigea ; que tout le fonds de commerce que Carrier avait sur le quai St. André, ne fut point entré dans l'inventaire ; que celui qu'il avait conjointement avec Matte, n'y fut entré que sur une liste fournie par ce dernier ; que le mobilier fut estimé à plus de 50 pour 100 au-dessous de sa valeur ; que plusieurs dettes actives, réalisées ensuite, furent entièrement omises dans l'inventaire, et que le don gratuit fut récéle aux mineurs Motz, et révoqué deux fois par Carrier ; enfin que Carrier se vantait de s'être débarrassé des réclamations des mineurs Motz à bon marché.

Autorités citées par le demandeur sur les divers points indiqués plus haut.

Le temps de la prescription ne peut courir que du jour que le créancier a pu intenter sa demande. Pothier, Obligations, vol. 3, p. 528, No. 679.

Le tuteur administrateur, etc., ne peut acheter aucune chose du bien dont il a l'administration. Pothier, Vente, vol. 4, p. 9, Nos. 13 et 14.

Le mineur devenu majeur à 30 ans peut revendiquer ses immeubles aliénés. Pothier, Traité des Personnes, vol. 7, pp. 474 et 475.

Les immeubles délaissés à une veuve par son premier mari sont propres, et doivent être réservés par elle aux enfants communs d'entre elle et son premier mari, sauf la part dont elle peut disposer suivant l'édit, au cas de secondes noces. Pothier, Contrat de Mariage, vol. 8, p. 443, No. 613.

Le mari survivant ne peut opposer aux héritiers de la femme, contre leur demande aux fins de partage, que la

prescription de 30 ans. Pothier, Communauté, vol. 9, p. 377, No. 534.

Les mineurs sont admis à la restitution contre leurs conventions, pour quelque lésion que ce soit. Pothier, Obligations, vol. 3, p. 29, No. 40.

Toutes personnes qui ont géré les affaires d'autrui sont obligées d'en rendre compte, tuteurs, protecteurs, gardiens, etc. ; jusqu'à ce qu'elles aient satisfait à cette obligation, elles sont toujours réputées comptables. Pothier, Procédure Civile, 2e partie, ch. 2, section 1re.

L'on n'a point d'égard à la fausse énonciation de majorité pour exclure les mineurs de la restitution. Pothier, Procédure Civile, 5e partie, ch. 4, art. 2, parag. 1, 2 et 5.

Le titre conditionnel empêche la prescription, quand la condition est suspensive. Bousquet, Dict. de Droit, vol. 1, p. 521.

L'erreur du calcul dans une transaction doit être réparée. Idem, p. 547.

Le tuteur ne peut transiger avec le mineur devenu majeur sur le compte de tutelle. Idem, vo. transaction, pp. 728 et 729.

Toute transaction sans reddition de compte est nulle. Idem, vo. transaction, p. 729. Merlin, Questions de Droit, vo. tuteur, parag. 3.

Toute transaction, tout contrat, passés entre le tuteur et le mineur devenu majeur, avant que le compte ait été rendu, n'obligent point le mineur, qui peut, quand bon lui semble, s'en faire relever et les faire déclarer nuls, quoiqu'il ait passé ces actes en majorité : car, en cette matière, le mineur devenu majeur est toujours réputé mineur vis-à-vis de son tuteur jusqu'à ce qu'il ait rendu compte. Pothier, Traité des Personnes et des Choses, pp. 479, 480 et 481.

Inventaire doit être fait avec un légitime contradicteur.
Art. 240 de la Coutume de Paris.

Si une donation est faite par un tuteur à son mineur, il ne peut opposer le défaut d'acceptation. Pothier, Traité des Donations, vol. 2, p. 30.

Le temps pour la prescription ne peut courir contre le propriétaire d'une chose, tant qu'il se trouve dans l'impossibilité d'intenter son action, Pothier, Prescription, Nos. 22 et 23.

La prescription, s'il y a eu dol ou erreur, ne commence à courir que du jour où ce dol ou cette erreur ont été découverts. L'obligation de rendre compte ne peut se prescrire que par 30 ans. Bousquet, vol. 2, p. 755, Vo. tutelle.

La simple déclaration de majorité faite par le mineur ne fait point obstacle à sa restitution. Idem, vol. 2, pp. 282 et 283.

Prescription est de 30 ans contre l'action en reddition de compte, et contre l'action rescatoire des transactions intervenues entre le tuteur et son pupille. Actes de Notoriété, pp. 73, 154, 157, 478, et pp. 102 à 109, 148 à 155,—226, 251, 252, 253. Le tuteur ne peut abandonner la tutelle. Meslé, des Minorités, p. 226.

Cession faite au tuteur est nulle. Idem, p. 253.

Décharge sans compte est nulle. Dol se présume en ce cas. Idem, pp. 292, 293 et 294 ; Chenu, Questions de Droit, cent. 1, quest. 22, 23, 24, 27 et 28 ; Meslé, 295 ; Arrêté du président Lamoignon, art. 127 ; et Meslé, pp. 595, 296, 297, 649, 650.

Le tuteur qui a payé d'avance ne peut exiger la restitution, mais seulement peut déduire sur son compte. Meslé, p. 664.

Transaction entre tuteur et pupille est nulle, si le compte n'a pas été rendu, et on en peut demander la cassation durant 30 ans. Duplessis, 1re partie, sect. 7, p. 323, No. 1 ; Guyot, Prescription, pp. 327 et 379.

On a distingué entre les transaction faites *visis tabulis* et celles qui étaient faites *non visis tabulis*. Ces dernières étaient nulles. Guyot, p. 329 ; Domat, vol. 1, p. 181 ; Lacombe, Recueil de Jurisprudence, p. 114, Transactions, &c ; article 1r., titre 29 de l'ordonnance de 1667 ; idem, p. 114 : " Un acte portant décharge de rendre compte donné à un tuteur *non visis tabulis* n'est pas valable ; en ce cas la lésion se présume, et l'action dure 30 ans. Rogron, Code français expliqué, pp. 77 et 419 ; Guyot, Lésion, p. 666 ; Solon, vol. 2, No. 386 : ratification d'actes nuls ne produit aucun effet.

Tels étaient les points de fait et les propositions de droit sur lesquels le demandeur faisait reposer ses prétentions.

Gauthier et Stuart, G. O., pour la défenderesse, soutenaient en substance ce qui suit :—

James Motz poursuit en trois qualités différentes :

1o. En qualité de légataire universel pour un cinquième dans la succession de dame Christiana McPhee, sa mère, en vertu de son dit testament.

2o. Comme héritier pour moitié dans la succession de demoiselle Catherine Motz, sa sœur, décédée en minorité, elle-même légataire universelle pour un cinquième en vertu du testament de sa dite mère Christiana McPhee.

3o. Comme cessionnaire de William Andrew Motz, son frère, de tous les droits mobiliers et immobiliers dans la succession de John Motz, son père, de Christiana McPhee, sa mère, et de demoiselle Catherine Motz, sa sœur.

En sa première qualité, le dit James Motz demande, 1o. l'annulation de l'inventaire du 31 août, 1830, fait devant

Mtre. Ls. Panet et son confrère, notaires, par Joseph Carrier, tant en son nom comme commun en biens avec Christiana McPhee, son épouse, que comme son légataire en usufruit et en propriété pour un cinquième, comme tuteur à Joseph Carrier, son fils mineur issu de son mariage avec la dite Christiana McPhee, et comme tuteur à Andrew William Motz et Catherine Motz, enfants mineurs issus du mariage du dit John Motz et Christiana McPhee.

2o. La rescission du transport par lui-même, James Motz, à Joseph Carrier devant Mtre. Panet et son confrère, notaires, le 27 avril, 1831.

3o. La rescission de l'acte de règlement de compte fait entre le dit James Motz et le dit Joseph Carrier devant Mtre. Ls. Panet et son confrère, notaires, le 30 avril, 1841.

4o. La demande de £300 pour moitié du don gratuit par Joseph Carrier et Christiana McPhee par acte fait à Québec, devant Scott, notaire, le 17 juillet, 1820.

Le dit James Motz, en sa première qualité, demande encore, 1o. l'annulation du dit inventaire, parce qu'il a été fait hors de la présence de Lewis Harper, tuteur nommé aux mineurs Motz en 1823, et sans légitime contradicteur, et que lui, James Motz, était mineur.

L'inventaire a été fait par Joseph Carrier, nommé tuteur à Andrew William Motz et Catherine Motz, le dit James Motz présent pour lui-même et comme subrogé-tuteur à son frère et à sa sœur. On ne peut se rendre compte ni expliquer la nomination de Lewis Harper comme tuteur, si ce n'est, comme dit M. Panet, notaire, *témoin* entendu dans la cause, pour intenter une action en délivrance de legs de la part de Joseph Carrier et Christiana McPhee, son épouse. En effet à quoi bon, et dans quel autre but avoir fait nommer ce tuteur ? Il n'y avait aucun bien des mineurs à administrer, et Joseph Carrier et son épouse vivaient avec leurs mineurs et les ont

tous élevés. Tous les biens appartenaient à la mère en vertu du testament de son mari, John Motz.

De plus la nomination de Lewis Harper faite dans un autre but, était illégale et aurait pu être mise de côté, vu que la mère vivait dans le temps avec ses enfants mineurs.

James Motz n'a pas produit d'acte de baptême, et a prétendu être né à St. Jean de Terreneuve, et que les registres auraient été brûlés.—Mais il n'y a point de preuve légale de ce fait.—Les témoins ne s'accordent point sur l'âge du dit James Motz ; et d'après les uns il aurait été mineur lors de l'inventaire, et d'après les autres il aurait été majeur ; et en effet il est bien difficile de prouver l'âge d'un jeune homme par l'apparence, quand il s'agit de quelques mois de moins que 21 ans ou de quelques mois de plus.—Néanmoins on ne peut faire autrement que d'en venir à la conclusion, que James Motz était majeur peu de mois avant ou peu de mois après l'inventaire. M. Ls. Panet dans son témoignage dit que James Motz a dit qu'il était majeur, lorsqu'il a été nommé subrogé-tuteur, et le Révd. M. Parant, Ptre. du Séminaire de Québec, prouve que le nom du demandeur est entré sur un registre du premier octobre, 1824, comme étant âgé de 15 ans et deux mois.—Les témoins du demandeur entendus à St. Jean de Terreneuve, disent qu'il est né en 1809 ou 1810,—que le régiment dans lequel était son père John Motz, est parti pour le Canada en 1813 ou 1814, que le demandeur avait alors 4 ou 5 ans ou 5 à 6 ans, ce qui le met majeur lors de l'inventaire.

James Motz prétend aussi que le dit inventaire est incomplet, incorrect et faux.

Le demandeur connaissait mieux et plus que les témoins entendus dans cette cause, l'état des biens possédés par Joseph Carrier et Christiana McPhee, son épouse, ayant toujours été avec eux ; il connaissait aussi la valeur des propriétés, le loyer que devait rapporter leur maison de la

Basse-Ville ; il connaissait aussi la valeur de la montre d'or qu'il avait payée lui-même pour Joseph Carrier ;

Supposant même que cet inventaire fût nul pour les causes mentionnées par le dit James Motz ; par le testament de Christiana McPhee, Joseph Carrier était exempté de faire inventaire. Joseph Carrier et James Motz ont pu s'en servir comme un état des biens, et pour faire les diverses transactions qu'ils ont faites entr'eux.

Dans cette première qualité comme susdit, le dit James Motz demande, 2o. la rescission du dit acte de transport du 27 avril, 1831, parce qu'il est entaché de dol et fraude, fait au-dessous de la juste moitié de la valeur ; parce que Joseph Carrier ne lui avait pas rendu compte des successions de ses père et mère, et qu'il était mineur ;

La défenderesse, en réponse à cette dernière partie, renvoie à ce qu'elle a allégué sur la demande de nullité de l'inventaire, à ce qui a rapport à la connaissance qu'avait alors le dit James Motz de l'état de la succession de sa mère, et à l'acte de mariage du dit James Motz, 3 mai, 1831, où il se dit majeur et négociant, et à la prescription plaidée par son exception préemptoire en droit perpétuelle. Dans cette même première qualité, le dit James Motz demande, 3o. la rescission du règlement de compte entre lui et Joseph Carrier du 30 avril, 1841, parce qu'il n'a pas été précédé d'une reddition de compte valable et légale, ni accompagné de pièces justificatives.

Par cet acte de règlement de compte du 30 avril, 1841, le dit James Motz, dans les termes ci-dessous mentionnés exprimés au dit acte, " confirme et approuve le compte " rendu par le dit Joseph Carrier de la succession mobilière et immobilière de la dite feue demoiselle Catherine " Motz, le 4 juillet, 1839, devant Mtre. Ls. Panet, notaire, " voulant et entendant qu'icelui soit executé avec lui quant " à sa part, suivant sa forme et teneur ; et en conséquence " du règlement et arrêté de compte ci-dessus, tient le dit

“ Joseph Carrier, et tous qu'il appartiendra, quittes du reliquat
 “ du dit compte, et de rendre aucun autre compte quel-
 “ conque, déchargeant le dit Joseph Carrier de toutes de-
 “ mandes et réclamations relativement à la succession mo-
 “ bilière et immobilière de la dite demoiselle Catherine
 “ Motz, et de toutes autres demandes quelconques, qu'il
 “ pourrait avoir contre lui jusqu'à ce jour.” Ce dit règle-
 ment de compte est basé sur l'inventaire et sur le dit acte de
 transport du dit James Motz à Joseph Carrier du 27 avril,
 1831, lequel est par conséquent ratifié dix ans après par cet
 acte du 30 avril, 1841. Lors de la passation de ce dernier
 acte la prescription était alors acquise au dit Joseph Carrier
 contre l'acte du 27 avril, 1831, et le dit James Motz était
 alors avocat, et il est établi dans la cause, par ses propres
 témoins qu'il devait savoir, et qu'il savait et connaissait, la
 valeur des biens de la succession de sa mère. Lors de
 l'institution de l'action, il y avait même plus de dix ans
 que l'acte du 30 avril, 1841, avait été consenti, et partant
 prescription acquise. Le dit James Motz n'allègue par sa
 déclaration ni dol ni fraude contre ce dernier acte et il n'en
 a pas été prouvé.

Autorités citées par la défenderesse à l'appui de sa défense
 touchant la prescription.

Arrêts de Louet, lettre, T. page 430. Mais si le mineur
 qui a transigé, ne se pourvoit dans les dix ans de la ma-
 jorité, ou le majeur dans les dix ans du contrat, contre les
 contrats et transactions faits avec son tuteur ; bien qu'il
 n'y eut aucune reddition de compte, ni représentation
 d'inventaire, partage ou autres actes ; il n'y sera plus re-
 cevable les dix ans passés. ”

Ancien Denisart, vo. tutelle, page 779, No. 103.

Les décharges de compte de tutelle, quoique données,
non visis tabulis, non dispunctis rationibus, ne peuvent
 plus être attaquées après les dix années de leur date, pos-

“ térieure à la majorité, suivant les arrêts rapportés par “ Louet, et Brodeau, son annotateur, sur la lettre T, sommaire “ 3, ce temps ayant été suffisant pour que le mineur, de- “ venu majeur, pût examiner s'il avait été lésé. ”

Merlin, Repertoire, 11e volume, vo. Rescission, page 697,
2e colonne, et page 698.

“ Depuis les ordonnances de 1533 et 1539, on a tenu pour “ maxime générale en France que les mineurs ont dix ans “ depuis leur majorité pour obtenir des lettres de rescission.

“ L'article 1304 du code civil porte que, dans tous les cas “ où l'action en nullité ou en rescission d'une convention “ n'est pas limitée à un moindre temps par une loi parti- “ culière, cet action dure dix ans.

“ Aujourd'hui dans toute la France, l'action en nullité “ des traités faits entre le mineur devenu majeur, et son ci- “ devant tuteur, et non précédée, tant de la reddition d'un “ compte détaillé, que de la remise des pièces justifica- “ tives, se prescrit par dix ans, à compter du jour de la “ majorité, laquelle s'acquiert depuis la loi du 20 septembre, “ 1792, par l'âge de vingt-et-un ans.” V. le Code Civil, Art. 175 et 1304.

9ème Merlin, Repertoire, page 559, vo. Prescription.

“ Dans le droit romain l'action rescatoire qui était fondée “ sur le dol, se prescrivait par le laps de deux ans. C'est “ ce que nous apprend la loi dernière *de dolo* ;

“ Mais dans nos mœurs il faut dix années pour la pris- “ crie.”

1er vol. de Despeisses, des Contrats, partie 1ère, titre 16, page 588, *nota*.

“ La jurisprudence du Parlement de Paris est que le mi- “ neur doit se pourvoir dans les dix ans de majorité contre

“ la transaction faite avec son tuteur avant le compte, et
 “ *non visis tabulis, sicuton qu'il est non recevable après les*
 “ *dix ans.* ”

15e vol. de Guyot, vo. Rescission, pages 328, 329.

1er vol. de Pothier, Contrat de Vente, No. 347.

Lacombe, Recueil de Jurisprudence, vo. Restitution,
 section 1ère, No. 4.

Meslé, Traité des Minorités, pages 365, 492 et 493.

Guyot, Répertoire, vo. Transaction, page 246, vol. 17.

Répertoire de Merlin, vol. 10, vo. Ratification, page
 723.

En sa première qualité, le dit James Motz demande, 4o. sa part du don gratuit. Quant à cette dernière partie de sa demande, le dit James Motz n'a pas prouvé le dit don gratuit. La copie filée n'est pas authentique ; point de certificat, point de date. D'ailleurs le dit don gratuit est rejeté par le jugement.

2ème. qualité.—En sa seconde qualité, savoir, en sa qualité d'héritier pour moitié dans la succession de Catherine Motz, sa sœur décédée en minorité, le dit James Motz demande encore la rescission du règlement de compte du 4 juillet, 1839. La prétention du dit James Motz en cette qualité, est différente seulement de celle émise en sa première qualité, en ce que Joseph Carrier était le tuteur de la dite Catherine Motz ; mais dans ce cas-ci, il y a un compte rendu en détail, accepté par le dit James Motz et approuvé par lui dans l'acte du 30 avril, 1841. Mêmes observations et mêmes autorités que sur la demande en sa première qualité.

3ème. qualité.—En sa troisième qualité, savoir, en qualité de cessionnaire de William Andrew Motz, son frère, le dit James Motz demande, 1o. la rescission du dit inventaire ;

2o. la rescission de la cession par le dit Wm. Andrew Motz au dit Joseph Carrier, devant Mtre. Panet et confrère, notaires, le 7 décembre, 1833 ; 3o. la rescission de la reddition de compte du 4 juillet, 1839, et approbation du dit compte par le dit Wm. A. Motz.

1o. L'acte de transport, qui donne au dit James Motz sa dite qualité de cessionnaire de Wm. A. Motz, est un acte illégal et nul à sa face, en autant qu'il est fait au demandeur en sa qualité d'avocat qui ne peut recevoir de transport de droits litigieux.

2o. Le dit acte de transport ne donne pas au dit James Motz le droit de demander la rescission des actes auxquels il a consenti, et qui sont mentionnés ci-dessus. Pour avoir ce droit, il faut qu'il soit mentionné spécialement dans le transport ou cession, ce qui n'a pas été fait.

Lacombe, Recueil de Jurisprudence, vo. Restitution, page 597, No. 15. "Cession générale de droits et actions ne comprend les rescindants et rescisoires;" vo. Transport, page 764, No. 6. Arrêts de Louet, lettre T, page 431, 2^e colonne :

"Les arrêts ont établi une autre exception en la personne du cessionnaire des droits des mineurs, qui n'est point favorable, ni recevable à demander la rescission de la transaction contre laquelle le mineur ne s'est point pourvu. Autre chose serait si la transaction ou la quittance, et acte de décharge, portait qu'il sera loisible au mineur de demander reddition de son compte, en rapportant et restituant ce qui lui a été donné."

Le dit Wm. A. Motz a approuvé la dite reddition de compte du 4 juillet, 1839, en ces termes : "Et le dit jour, quatre juillet, 1839, a comparu par devant les notaires publics soussignés, William Andrew Motz, ingénieur des steamboats, demeurant à la Nouvelle Orléans, dans l'Etat

“ de la Louisiane, lequel ayant pris communication et lecture du compte ci-dessus, vu et examiné toutes les pièces justificatives d'icelui, déclare le trouver juste et correct en tous ses résultats ; en conséquence veut et consent “ qu'il soit suivi selon sa forme et teneur. ”

Sur cette question la défenderesse réfère aux observations par elle faites et autorités citées, sur la demande du dit James Motz en sa première qualité, et sur la prescription. Le demandeur prétend que Wm. A. Motz est né en décembre, 1811. L'acte de cession par lui à Joseph Carrier est du 7 décembre 1833 ; il était alors majeur.

Cet acte est ratifié par le dit William Andrew Motz, par l'acte du 4 juillet, 1839.

Pour établir la lésion, dol et fraude, lors de l'inventaire, l'on a prétendu que, lors de la mort de Christiana McPhee, en avril, 1829, et lors de l'achat de la maison de la Basse-Ville, la dite Christiana McPhee et Joseph Carrier passaient pour riches ; et qu'eux-mêmes s'étaient vantés d'être riches, qu'ils avaient dit lors de l'achat de la maison de la Basse-Ville, qu'ils avaient payé cette maison £2,500, et qu'ils avaient encore assez d'argent pour en acheter une autre. Pour faire voir qu'on ne doit point s'arrêter à une semblable preuve, la défenderesse réfère au témoignage de J. W. Leaycraft, et à l'exhibit produit par lui, par lequel il est établi qu'en août, 1827, le dit Joseph Carrier a emprunté du père du témoin £500, disant que c'était pour payer la maison qu'il avait achetée. Cette somme a été remise trois à quatre mois après.

L'on a prétendu encore, que l'estimation de la dite maison £2,500, lors de l'inventaire, n'était pas la moitié de la valeur. Cette maison avait été achetée en août, 1827, pour le prix de £2,500, et environ trois ans après l'inventaire a été fait, et on a mis la même valeur. Les témoignages sur la valeur de cette propriété sont contradictoires.

Les témoins entendus de la part de la demande pour prouver la richesse de Christiana McPhee et Joseph Carrier, varient dans leur estimation de £6,000 à £12,000. Leur estimation de la richesse des dits Carrier et son épouse est si exagérée, et si peu appuyée de faits, que leur témoignage n'est pas croyable.

La Cour Supérieure après avoir entendu les parties, a rendu le jugement suivant :

La Cour ayant examiné la procédure, et la preuve, entendu les parties par leurs avocats, et sur le tout mûrement délibéré ; considérant que le demandeur a droit, en vertu du testament de feuë Christiana McPhee, sa mère, veuve en premières noces de feu John Motz, et épouse en secondes noces de feu Joseph Carrier, aussi maintenant décédé, reçu à Québec, devant Mtre. Louis Panet et son confrère, notaires, le vingt-quatrième jour de décembre, mil huit cent vingt-huit, sujet à l'usufruit en faveur du dit Joseph Carrier, sa vie durant, à trois cinquièmes au total des biens délaissés par la dite Christiana McPhee, savoir : un cinquième comme étant aux droits de William Andrew Motz, son frère, suivant acte de transport, sous seing privé, attesté du seing et sceau du maire de la ville de Buffalo, dans l'Etat de New-York, et déposé le vingt-quatre avril, mil huit cent cinquante-deux, en l'étude de Mtre. Petit-clerc, notaire, et dont copie est produite en cette cause, le dit William Andrew Motz étant aussi légataire universel pour autant ; un dixième comme représentant en vertu du même transport, le dit William Andrew Motz, héritier pour moitié de feuë Catherine Motz, sa sœur, aussi légataire universelle pour un cinquième de sa dite mère, et décédée en minorité et *ab intestat* ; et enfin le dit James Motz pour un dixième comme héritier aussi pour moitié de la dite Catherine Motz ;—que le dit demandeur était mineur lors du prétendu inventaire fait à Québec, par le ministère du dit Mtre. Louis Panet et de son confrère, le trente-et-un août, mil huit cent trente, par le dit Joseph Carrier, des

biens de la communauté d'entre lui et la dite Christiana McPhee, ainsi que le vingt-sept avril, mil huit cent trente-et-un, date du prétendu transport de droits successifs par le dit demandeur au dit Joseph Carrier, par acte devant le dit Mtre. Panet et son confrère ;—que le dit William Andrew Motz était pareillement mineur, lors de la prétendue cession par lui faite au dit Joseph Carrier, par acte devant Mtre. Panet et son confrère, en date du sept décembre, mil huit cent trente-trois ; que le dit prétendu inventaire est en-taché de lésion, dol et fraude, et confond les biens propres à la dite Christiana McPhee avec ceux de la dite communauté ; que le dit inventaire est nul en droit comme fait sans contradicteur ; considérant principalement que lors des dits actes respectifs du vingt-sept avril, mil huit cent trente-et-un, et sept décembre, mil huit cent trente-trois, il n'a été rendu par le dit Joseph Carrier aucun compte de la tutelle qu'il avait gérée et administrée, ni fait remise des papiers concernant cette gestion ; que l'acte du quatre juillet, mil huit cent trente-neuf, reçu devant le dit Mtre. Panet et son confrère, notaires, et intitulé : " reddition de compte par Joseph Carrier à William Andrew Motz," ne contient non plus aucun compte mais seulement la mention de la somme que, d'après le dit inventaire, le dit Joseph Carrier reconnaissait afférer à la succession de la dite Catherine Motz ; que l'acte du trente avril, mil huit cent quarante-et-un, reçu devant le même notaire et son confrère, intitulé : " règlement de compte entre Joseph Carrier et James Motz," ne comprend non plus aucun compte ; que vu l'absence des dits comptes et pièces, et vu le dol et la fraude, le demandeur ès-dits noms est encore aujourd'hui recevable en droit à se pourvoir en restitution contre les dits actes et à invoquer leur nullité,—déclare le dit inventaire du trente-et-un août, mil huit cent trente, et les dits actes du vingt-sept avril, mil huit cent trente-et-un, sept décembre, mil huit cent trente-neuf, et trente avril, mil huit cent quarante-et-un, nuls et rescindés, et remet le demandeur ès-dits noms aux mêmes état et droits que s'ils n'eussent pas été passés, sauf à

rendre compte de ce qui a été reçu par lui ou ceux aux droits desquels il agit, avec l'intérêt jusqu'au décès du dit Joseph Carrier ; condamne la défenderesse ès-qualités mentionnées en la déclaration, à rendre au demandeur, sous quatre mois de la signification du présent jugement, un compte bon et fidèle et sous serment, de la gestion du dit Joseph Carrier des biens appartenant aux dits James Motz, William Andrew Motz, et Catherine Motz, y compris le compte des biens, meubles et immeubles, dépendant de la succession de la dite Christiana McPhee, comprenant tant ceux qui lui étaient propres, que ceux dépendant de sa communauté avec le dit feu Joseph Carrier, à l'époque du décès de la dite Christiana McPhee ; ordonne que, pour constater les biens de la dite succession et de la dite communauté avec le dit feu Joseph Carrier, à l'époque du décès de la dite Christiana McPhee, il sera procédé, sous le délai ci-dessus, à en dresser bon et fidèle inventaire, suivant la loi ; et la Cour, admettant la prétention du demandeur quant au don gratuit mentionné en la déclaration pour un dixième, savoir, pour le cinquième de la moitié, renvoie le dit demandeur de cet partie de sa demande qui a rapport au prétendu don gratuit et à la continuation de communauté après le décès de la dite Christiana McPhee, réserve à faire droit ultérieurement sur les autres conclusions de la déclaration ; dépens réservés.

BADGLEY, Juge :—après avoir analysé la déclaration du demandeur et les divers plaidoyers de la défenderesse, et donné un aperçu des faits de la cause dans le sens des prétentions du demandeur, dit en substance :

La principale question qui s'élève en cette cause, est de savoir si le demandeur est non recevable à faire prononcer la nullité des divers actes mentionnés dans son action, attendu qu'il s'est écoulé plus de dix ans depuis la passation de ces actes et depuis la majorité des enfants Motz. La défenderesse a plaidé cette prescription de 10 ans, outre la chose jugée, quant à ce qui concerne le don gratuit. A ce plaidoyer de

prescription, le demandeur a répliqué spécialement, que Carrier, ayant été le tuteur, pro-tuteur et gardien des enfants Motz, ne pouvait invoquer contre eux cette prescription, non plus que ses représentants ; qu'il n'avait produit aucun compte ni pièces justificatives, et que conséquemment il ne pouvait invoquer la prescription en faveur de transactions faites sous ces circonstances ; que Carrier avait l'usufruit des biens délaissés par sa femme, Christiana McPhee, et que conséquemment les héritiers Motz n'étaient en droit d'agir qu'à l'expiration de cet usufruit ; que les transactions attaquées étaient frauduleuses et nulles de plein droit, et qu'en conséquence il n'y avait point lieu à la prescription invoquée ; et enfin que la chose jugée aurait pu être opposée à la partie du don gratuit due par Carrier, mais non à celle due par Mme Motz, laquelle seule était réclamée.

La question est donc quant à la validité de ce plaidoyer de prescription de 10 ans. Le demandeur demande l'annulation de tous les actes intervenus entre Carrier et les héritiers Motz, depuis l'inventaire du mois d'août, 1830, qu'il considère comme une nullité absolue.

Je considérerai d'abord cet inventaire du 31 août, 1830, qui est la base sur laquelle reposent les prétentions des parties en cette cause.

Il est de principe certain, qu'arrivant la dissolution de la communauté, le devoir du survivant est de faire un bon et loyal inventaire : rien ne peut le soustraire à cette obligation, ni la volonté du testateur, ni une stipulation à cet effet dans un contrat de mariage. Lebrun, Communauté, page 562, dit : Il n'est point juste que par une stipulation de cette sorte l'on fasse préjudice aux enfants du premier lit; et que le mari soit dispensé par là indirectement d'une formalité établie pour un intérêt public : car la nécessité de faire inventaire étant imposée par la loi et pour l'intérêt des mineurs, le père ne s'en peut exempter, et on ne peut imposer silence aux enfants, etc., etc. : ce qui est fondé sur les plus

pures maximes. Proudhon, de l'Usufruit, vol. 2, page 287, dit : La dispense ou la défense même de faire inventaire, en quelques termes qu'on la trouve exprimée dans le testament, ne doit avoir d'autres effets que de forcer l'héritier à supporter les frais de l'inventaire auquel il voudra faire procéder. Pothier, Communauté, No. 680, dit : L'inventaire des biens de la communauté est la première démarche pour parvenir au partage des biens de la communauté après sa dissolution. Serpillon, Code Civil, page 533, dit : Une clause de ne pas inquiéter le comptable ne le dispense pas de rendre compte ; et il cite un arrêt du 12 octobre, 1749, où il a été jugé que la décharge de rendre compte n'opère pas une libération absolue à cet égard.

Le Nouveau Denisart, *verbo* Continuation de Communauté, page 414, no. 7, dit que telle est l'opinion la plus commune. Ferrière, *verbo* Tutelle, p. 154, dit : Le tuteur est obligé de faire inventaire nonobstant la décharge d'en faire par le testateur.

Ayant établi que Carrier ne pouvait pas être exempté de faire inventaire nonobstant la clause à cet effet dans les testaments de dame Christiana McPhee, il s'ensuit qu'il était tenu de faire un bon et loyal inventaire, suivant les dispositions de la coutume, avec légitime contradicteur et personne capable, contenant tous les biens qui étaient communs au temps du décès de son épouse, soit meubles ou conquêts immeubles, et de le faire clore en justice, et ce, à peine de nullité.

Ferrière, Petit Commentaire de la Coutume de Paris, vol. 2, art. 240, page 83, dit : L'inventaire doit être fait en présence de personnes capables et avec le légitime contradicteur ; en sorte que s'il y a des mineurs, il doit être fait en présence de leur tuteur, et si le survivant est leur tuteur, il doit être fait en présence d'un subrogé-tuteur et par lui signé : autrement il y aurait nullité, et sera réperte non valablement fait. Lebrun, Communauté, pp. 564, 565, dit : Lorsque l'inventaire est fait sans légitime contradicteur, ce

défaut porte coup sur la foi de l'inventaire, parce qu'un inventaire sans contradicteur, à proprement parler, n'est pas un inventaire. Merlin, *Reptoire, verbo Continuation de Communauté*, no. 6 ; Pothier, *Communauté*, nos. 796, 797 ; ancien Dénisart, *verbo Continuation de Communauté*, p. 685, no. 3 et suivants ; nouveau Dénisart, *verbo Continuation de Communauté*, pp. 414, 415, 416, nos. 15 et 19 ; *Actes de Notoriété*, pp. 189, 190, 478, 479.

Suivant tous ces auteurs l'inventaire doit être exact et fidèle ; il doit contenir une exacte énumération des biens ; les biens, meubles, bijoux, ustensiles, marchandises, etc., doivent être estimés et prisés par des appréciateurs jurés, à Paris, par les huissiers priseurs, officiers que nous n'avons pas ici, ou par d'autres personnes qui prêtent serment, et si les parties n'en conviennent, le juge en nomme un. C'est une formalité invariable et indispensable. L'inventaire doit être aussi fait sans recélés ou omissions, et il doit être clos en justice. Lebrun, pp. 564 et 565 ; Pothier, *Communauté*, p. 558 ; Meslé, *des Minorités*, p. 631, nos. 41, 42 et 43 ; l'Ancien Dénisart, *verbo Continuation de Communauté*, p. 685, nos. 3, 8 et 9, tiennent cette doctrine. Dénisart dit : Il ne doit point y avoir de dol ni de fraude de la part de celui des père et mère qui survit ; un inventaire nul et frauduleux ne doit pas être considéré : c'est comme s'il y en avait pas eu : et à l'appui de cette opinion, il cite les *Actes de notoriété*, p. 190, et Duplessis qui dit : Quand il y a des omissions dans des inventaires, on les déclare nuls, en haine des recélés. Dénisart ajoute là-dessus : Le sentiment de Duplessis a été suivi par les arrêts que je rapporte dans ma collection à l'article continuation de communauté ; la coutume exige en effet bon et fidèle inventaire. Le même auteur à la page 479, après avoir énuméré les formalités susmentionnées pour faire un bon et valable inventaire, ajoute : Toutes ces conditions prescrites par la coutume sont de rigueur, et si essentielles que l'omission d'une de ces formalités emporte la nullité de l'inventaire et le rend sans effet.

L'une des premières formalités requises est que l'inventaire soit fait en présence du tuteur ou mineur, et si le comptable est ce tuteur, en présence du subrogé-tuteur et personne capable. Un mineur ne peut pas être tuteur ; sa nomination serait une nullité. Ferrière, *verbo* Tutelle, p. 56, dit : Un mineur ne peut être tuteur : ne serait-ce pas en effet une chose étrange qu'un mineur, qui est jugé incapable de se conduire lui-même et que d'autres conduisent, soit admis à la tutelle ? A la page 57 le même auteur ajoute : De ce que la loi prohibe d'appeler à la tutelle le mineur, point de doute que si le juge ne laissait pas de le nommer tuteur, la nomination qu'il en ferait serait nulle de plein droit : car tel est l'effet des lois prohibitives, d'annuler *ipso jure* tout ce qui se trouve fait au préjudice de la prohibition, quand même la nullité ne serait pas expressément prononcée..... Le mineur ne serait pas obligé de désavouer et n'encourrait aucun péril..... Bien plus, le mineur voulût-il agréer le choix fait, son consentement deviendrait inutile.

L'énonciation de majorité faite par le mineur ne serait d'aucun effet. Pothier, vol. 7, Procédure Civile, page 313, dit : On n'a point d'égard à la fausse énonciation de majorité pour exclure les mineurs de la restitution. C'est à celui qui contracte avec le mineur de s'informer de son âge. Ceux qui contracteraient avec des mineurs, feraient insérer dans l'acte qu'ils se sont dits majeurs, et diraient toujours que les mineurs les ont trompés, quoique souvent ce serait plutôt un artifice pratiqué de leur part que de celle des mineurs. Solon, des Nullités, page 185, tient la même doctrine.

Dans l'espèce, Carrier qui épousa la mère du demandeur, quand celui-ci n'avait pas plus de 9 ans, devait connaître son âge mieux que le demandeur lui-même. Il y a deux arrêts de Louet, p. 142, nos. 2 et 3, et pp. 144 et 145, n°. 13, au même effet. Il y a aussi un arrêt du Parlement de Paris du 16 février, 1691, dans lequel, le procureur-général La-

moignon observa : Il est reconnu qu'il est aussi facile d'engager un mineur de se dire majeur que de vendre son bien. Voir encore un autre arrêt du 26 avril, 1629, rapporté par Louet, p. 71, no. 14.

La preuve de la naissance des enfants Motz, à l'exception de celle de Catherine, est faite par témoins. Ils sont nés, à la suite d'un régiment, de parents attachés au service militaire, dans un pays lointain. L'on n'a pu découvrir les registres contenant l'acte de naissance de ces enfants, mais du témoignage de la femme Murphy et autres, et des déclarations de sa mère, il résulte que le demandeur est né en octobre, 1810, et qu'il était mineur quand il a été nommé subrogé-tuteur et quand l'inventaire a été fait ; ce qui rend l'inventaire nul. D'un autre côté, Carrier ne pouvait lui-même se faire nommer tuteur en juillet, 1830, lorsqu'il avait fait lui-même nommer tuteur le nommé Lewis Harper en 1823, lequel vivait encore en 1830. Sa nomination était nulle et par suite l'inventaire était nul. Voir un jugement rendu à Montréal dans la cause de Dunn contre Beaudry. Ainsi l'inventaire a été fait par Carrier sans qu'il eût la qualité qu'il assumait, en présence du demandeur, qui ne pouvait exercer l'office de subrogé-tuteur que Carrier lui avait fait conférer. Pourquoi, il faut dire que cet inventaire a été fait sans légitime contradicteur, ce qui le rend encore nul. D'ailleurs il résulte de la preuve que dans cet inventaire il y a des omissions considérables.

La cour en est donc venue à la conclusion que cet inventaire est frappé de nullités absolues, *ab initio*, et que les parties doivent être remises au même état qu'elles étaient avant la passation de cet acte.

La loi et la coutume déclarent de tels inventaires nuls de plein droit, et dans pareil cas, il n'aurait pas été nécessaire en France d'obtenir des lettres de rescission, parce que quand un acte est absolument nul, la loi ne requiert point des lettres de rescission dans les dix ans de la date de son exécu-

tions. Louet, vol. 2, pp. 305 et 306, nos. 23 et 27, rapporte un arrêt du 27 janvier, 1699, par lequel il a été jugé, que la prescription de 10 ans pour se pourvoir par lettres de rescission contre un acte nul, n'avait point lieu et ne pourrait être objectée ; les parties remises au même état comme avant, etc., etc. ; et un arrêt du 24 mai, 1661, au même effet, par lequel une obligation fut annulée 29 ans après sa date : Henrys, vol. 2, pp. 266 et 267. Quand l'acte est nul d'une nullité radicale, le bénéfice de restitution sert même un majeur, cela est juste et raisonnable, quand l'acte principal est nul par nullité radicale et qui choque le droit public, en ce cas, la même nullité porte conséquence pour tout ce qui en dépend et l'accessoire n'est pas de meilleur aloi que le principal ; c'est une influence commune et qui ruine aussi bien la fidéjussion que l'obligation principale, la minorité seul ne suffirait, mais quand, outre la minorité, il y a quelqu'autre nullité radicale, elle sert aussi bien au majeur qu'au mineur. A la page 267, le même auteur ajoute : C'est parce que en effet, il y aurait du dol, soit qu'on considère la qualité du tuteur, soit qu'on s'arrête à celle du mineur, dans l'un et l'autre cas.

Pothier, vol. 7, Procédure Civile, p. 311, dit : Les actes nuls de plein droit n'ont pas besoin de lettres de rescission pour être déclarés tels. Merlin, *verbo rescision*; page 185 ; Ferrière, vol. 2 ; Petit Commentaire, p. 96, article 240.

Merlin, *verbo Nullité*, No. 1, dit : Tout acte fait par une personne que la loi a déclarée incapable, ou dans une forme qu'elle proscrit, est un acte que l'on doit regarder comme nul, et il n'est pas nécessaire que la peine de nullité soit expressément prononcée, etc., etc.

Solon, page 4, Des Nullités d'ordre public.

Quand l'acte de cession indique que l'intention des parties a été de transporter l'action rescindante, il n'est pas nécessaire que la cession des rescindants et rescisoires soit expresse. Guyot, *verbo*, rescindant et rescatoire.

Il n'y a pas eu de ratification expresse de l'inventaire, lequel était nul de plein droit. Solon, vol. 2, page 253, no. 294, dit : Confirmer un acte ou le ratifier, c'est lui donner une force qu'il n'aurait pas eu par lui seul..... La source du droit des parties est uniquement dans le premier acte, mais c'est par l'acte confirmatif que le droit devient irrévocabile ; le premier le fait naître, le second lui donne la force et l'action. *Quod nullum est non potest confirmari.*

Ricard, des Donations, No. 619, tient la même doctrine.

Louet, pages 736 et 737, cite un arrêt à cet effet du 27 novembre, 1585. Idem, page 738 : " toute transaction faite entre le tuteur et mineur devenu majeur est nulle s'il n'y a en compte." Ferrière, Tutelle, page 365.

A. Dénisart, *verbo* Compte, p. 578, nos. 15 et 16.
Merlin, *verbo* Tutelle, page 223.

LELIEVRE et ANGERS, pour le demandeur.
GAUTHIER et LEMIEUX, pour la défenderesse.
STUART, G. O. conseil.

SUPERIOR COURT.—MONTREAL.

Before MONK, BERTHELOT and PELLETIER, Assistant-Judges.

Ex parte.

No. 989. { CARIGNAN..... Petitioner.
 and
 THE HARBOUR COMMISSIONERS OF MONTREAL... Prosecutors in the Court below.

1o The service of a copy of a summons issued by a Magistrate, certified by the Clerk of the Peace, followed by the appearance of the defendant, is sufficient

2o A complaint may be made, and summons issued for two offences, provided the object be not to arrest the defendant in the first instance.

3o A conviction for one of such offences specifying it, is good.

4o It is not necessary in a complaint for breach of a By-law, to insert the By-law itself, or make a distinct allegation that it is in force.

5o A case may be returned before one Magistrate and adjourned from day to day by one or more; it is sufficient if the trial and conviction take place before one and the same,—but:

6o A conviction for two offences inflicting only one penalty, is bad.

1o La signification de la sommation d'un Juge de Paix, certifiée par le Greffier de la Paix, suivie d'une comparution par le défendeur, est suffisante.

2o Il peut être porté plainte pour deux offenses, et sommation émanée sur icelle, pourvu que l'objet ne soit pas d'arrêter le défendeur d'abord.

3o Une conviction pour l'une de ces offenses indiquant laquelle, est bonne.

4o Il n'est pas nécessaire dans une plainte pour l'infraction d'un règlement, d'y insérer tel règlement, ni d'alléguer spécifiquement que tel règlement est en force.

5o Une cause peut être rapportée devant un Juge de Paix et adjournée de jour en jour par un ou plusieurs autres Juges de Paix; il est seulement nécessaire que le procès et la conviction aient lieu devant le même,—mais:

6o Une conviction pour deux offenses qui n'indique qu'une pénalité, est vicienne.

Judgment rendered the 29th September 1855.

This was a rule to quash a conviction by one Magistrate at a special session of the Peace, for offending against the provisions of the following By-law of the Harbour Commissioners of Montreal.

Article 36. “Firewood, landed on any of the wharves, “or on the beach of the harbour, shall be conveyed away, or “piled under the direction of the Harbour Master, by the “owner, agent or person in charge thereof, as fast as the “same shall be landed, under a penalty against such “owner, agent or person in charge, not exceeding ten “pounds for each and every offence, and a further like pe-“nalty for every twenty four hours such firewood shall not “be conveyed away or piled, after the Harbour Master shall “have ordered their being conveyed away or piled.”

The summons in the Court below, addressed to the petitioner, alleged that :

"Whereas complaint hath this day been made &c., by the Harbour Commissioners of Montreal, for that you, being the owner of a quantity of firewood landed on the pier in the Harbour of Montreal, known as the third pier in said Harbour from the Basin, therein known as the King's Basin, did, on the fourteenth day of November instant neglect and refuse to convey away the said firewood as fast as the same was landed, when directed so to do by the Harbour Master, and did suffer the said firewood to remain on said pier, to wit, on said fourteenth and fifteenth days of November instant for twenty four hours after the Harbour Master had ordered you to convey the same away, to wit, on the fourteenth day of November instant, the whole contrary to the thirty sixth article of the second chapter of the By-laws of the Harbour Commissioners of Montreal."

The conviction declared that :

Joseph Carignan, of the city of Montreal, in the district of Montreal, wood dealer, is convicted before the undersigned, one of Her Majesty's Justices of the Peace for the said district, for that he, the said Joseph Carignan, being the owner of a quantity of firewood, landed on the pier in the Harbour of Montreal, known as the third pier in said harbour from the Basin, therein known as the King's Basin, did, on the fourteenth day of November instant, neglect and refuse to convey away the said firewood as fast as the same was landed, when directed so to do by the Harbour Master, contrary to the thirty sixth article of the second chapter of the By-laws of the Harbour Commissioners of Montreal, and I adjudge the said Joseph Carignan, for his said offence, to forfeit and pay the sum of five pounds, current money of this Province."

The affidavit of circumstances set up the following grounds of objection to the conviction, viz :

1. The service of the summons is null, the original or duplicate original ought to have been left with the defendant, and not a certified copy.
2. The summons is null inasmuch as it contains two distinct offences, which is expressly forbidden by law.
3. The clauses of the by-law referred to, are not contained in the summons as required by law, to enable the defendant to defend himself, and the Court to judge if an offence has been committed.
4. The complaint does not deny that the defendant had permission from the Harbour Commissioners of Montreal to do what is complained of.
5. The allegations do not clearly show that the offences were committed within the limits of the jurisdiction of the Justice of the Peace.
6. The complaint does not show that what is complained of was matter within the jurisdiction of the Harbour Commissioners of Montreal, nor that the by-law was then in force.
7. The conviction does not show that any offence was committed within the jurisdiction of the Justice of Peace.
8. The omission, in the conviction, of the place where the offence was committed, is fatal.
9. The omission, in the conviction, of the date and place, when and where the defendant was requested by the Harbour Master to do what it is alleged was neglected, is also fatal, and renders the conviction null.
10. The summons having been returned before Jean Louis Beaudry, esquire, he only had jurisdiction and quality to adjudge upon the said complaint.

CARTER and POMINVILLE, for the petitioner, urged in support of the rule :—

1. That the Statute, 14 and 15, Victoria, cap. 95, § 1, required the service upon the defendant of an original or duplicate original of the summons, certified by the magistrate himself, and that the service of a copy certified by the Clerk was not sufficient. (1)

2. That the summons was null on the ground assigned in the second reason, inasmuch as by the statute 14 and 15 Vic. cap 95, § 9 the insertion of two offences in a complaint was expressly forbidden; and that a like rule obtains in-England under the provisions of a statute precisely similar.

3. That the omission of the by-law was fatal, as the defendant was entitled to know precisely the tenor of the rule which he was alleged to have infringed. (2)

4. That as under § 55 of the Harbour by-laws the defendant might have allowed his wood to remain on the wharf with the permission of the Commissioners, the absence of that permission was an element of the offence, which should have been stated in the summons and conviction, every exemption should have been negatived. (3)

The dissent of the Harbour Commissioners should have been alleged. (4)

5. That the place and situation of the Harbour of Montreal should have been alleged, as without that, there was nothing to show that the Justice of the Peace had any jurisdiction.

6. That the complaint should have alleged distinctly that the by-law was then in force, as the proof of that fact was necessary to make out the plaintiff's case, and no proof could be offered of facts not alleged. Proof could only be made *secundum allegata*.

(1) Archbold's Justice, 265.

(2) Glover on Corporations, 310:—2 Kyd 367:—1 B. and P. 100. Feltmakers vs. Davis:—Paley on Convictions, 102.

(3) Paley 115.

(4) Paley 110:—Wickes vs. Clutterbuck, 3 D. and R.

7. That it did not appear that the offence was within the jurisdiction of the Justice. The offence consisted in the refusal to convey away. Now though the wood lay upon the wharf, the refusal might have taken place any where else, and though it might be inferred from the complaint and conviction, that the refusal took place there, such an inference was not sufficient to support the conviction, as locality cannot be supplied by intendment. (1)

8. That it was also necessary to allege the directions of the Harbour Master, and the time and place when and where they were given. The refusal to obey these directions being the gist of the offence, they should have been set up with accuracy as to time, place and circumstances.

9. That the adjournment, and final hearing and trial of the case before different Justices, were clearly fatal. The Justice who was first seized of the case alone had the right to hear and adjudicate upon it. The jurisdiction over a case appertains to the first Justice who has cognizance of it. (2)

ABBOTT for the prosecutors contended :

1. That the Clerk of the Peace, being Clerk to the Magistrates at Special Sessions (14 and 15 Vict. cap. 95, § 32,) had sufficient authority to certify copies of summons for service, and that such service was valid ; that, at all events, the Statute cited, § 1, expressly deprived defendant of any advantage from informality either in the form or substance of the Summons, other than an adjournment in certain cases ; and finally that his appearance cured any defect of the kind. (3)

2. That the proceeding complained of being a simple verbal information or complaint, without any arrest in the first instance, the prosecutors had a right to summon the de-

(1) Paley 164 :—R. vs. Hazel, 13 East 142 :—R. vs. Edwards, 1 East, 279, 282 :—R. vs. Chandler, 14 East 274.

(2) Paley, 27 :—Our statute, 14 and 15 Victoria, Cap. 95, § 25, only applies to ministerial acts before and after trial and conviction, in cases, where trial and conviction must be had before two Magistrates.

(3) R. vs. Stone 1 East 649 :—1 Archbold's Justice, 267 :—R. vs. Johnstone, 1 Str. 261 :—Paley, pp. 36, 39, 40.

fendant to answer for two offences if they thought proper ; and he might have been properly convicted of both. (1) That our Statute § 9 clearly made a distinction between cases commenced by summons and those begun by arrest in the first instance ; prohibiting prosecutions for more than one offence, by one information, only when immediate arrest is contemplated. That the matters complained of were not so much two distinct offences as the continuance of one and the same offence during two specific periods, rendering the offender liable for two penalties, the one for the offence, the other for its prolongation.

3. That the by-laws of the Commissioners were in the nature of public laws, as they might be said to form part of the Statute under which they were made. (2) Every one subject to their jurisdiction is bound to know them, and take notice of them ; (3) and they are officially promulgated in the *Canada Gazette* under the directions of the Statute 16 V. cap. 24, § 6. Even in formal declarations in assumpait for a penalty, the insertion of the by-law is not necessary. (4) But these proceedings are summary, and require less minuteness of allegation than informations before the higher Courts. (5)

4. The only case provided for by by-law 55, is the piling of wood under the " revetment wall." If defendant had been charged with piling wood there, it might have been necessary to allege the absence of permission from the Commissioners, but clearly not in the present instance, when he is charged with allowing it to remain on the pier. Even in the former case the dissent of the Commissioners might appear inferentially ; (6) as by the action being brought in the names of the Commissioners. *Wickes vs. Clutterbuck*, already cited is precisely in point. (7) It was there held

(1) Paley, 195 et seq :—*I Archbold* 274.

(2) *Grant on Corporations*, p. 90.

(3) *Id.* p. 87.

(4) *Angell and Ames*, No. 366.

(5) 16 V. cap. 24, § 20.

(6) *Ex parte Gleason*, Sup. Court M. 1850.

(7) Paley, 110, 111.

that the fact of an information being laid by the owner of property, was sufficient to show that an invasion of it was "against his will."

5. The position and limits of the "Harbour of Montreal" are clearly defined by the Statute, 16 V. cap. 24, § 4 & 20, which gives jurisdiction over penalties inflicted under that Statute to any Justice in the district of Montreal.

6. The assertion in the complaint that the offence was contrary to the by-law was sufficient, without a specific allegation that the by-law was still in force. It was no more necessary to say so, than to allege specifically in a complaint for breach of a Statute, that such Statute was still in force. If the By-law had lapsed it was for the defendant to show it.

7. The offence complained of is not so much the *refusal* to remove as the *neglect* to remove. There is a wide distinction between the two ; for if the offence were the neglect to take away, it could only have occurred where the wood lay, which appears clearly in the complaint and conviction ; while a refusal might have taken place anywhere. The substance of the offence is the encumbrance of the wharf, not merely disobedience of the Harbour Master. The cases cited are therefore not analogous, In Rex vs. Hasel,—the offence was combining to refuse to work—and the conviction stated that, while Hazel was employed by A. of B., he refused to work with C. It is clear this refusal might possibly have been anywhere as well as at B. In Rex vs. Edwards, the defendant was convicted of fishing in a stream between two places, both of which were in the County where the conviction took place, but the course of the stream between those places, and consequently the place of the offence, might have been in another County. The same distinction is plain in R. vs. Chandler.

A perusal of the by-law will make it clear that, the directions of the Harbour Master are only necessary, when

the offence complained of, is neglect to pile wood, not where it is merely neglect to convey it away:

9. The Statute 14 and 15 Vic. cap. 95, § 25, expressly and distinctly authorises any Magistrate to perform any act whatever in any case, previous or subsequent to the hearing and decision. In this case the acts of the different Magistrates were merely to record the adjournments of the case from day to day, while the convicting magistrate alone heard and decided it. In *ex parte Delisle*, there were two distinct arguments before different Justices.

The conviction was sustained. In the judgment no motives are set forth. (1)

LORANGER, POMINVILLE and LORANGER, for petitioner.

E. CARTER, Counsel.

ABBOTT, J. J. C. counsel for Harbour Commissioners.

(1) In a subsequent and similar case, between the same parties, the same questions presented themselves with the addition, that the defendant was convicted of both offences, "of the said offences", and condemned to pay for "his said offences" the sum of five shillings.

It was urged, on behalf of the petitioner, that this conviction was bad, as inflicting only one penalty for two offences, inasmuch as it was impossible to say, for which of the offences he was condemned to pay the penalty. (*Rex vs. Selomons*, I T. R. 251.)

On the other side it was represented that in *Rex vs. Selomons*, the conviction was for two offences, while the penalty was stated to be inflicted for his "said offence"; this was clearly bad. But in the present case the amount of the penalty not being fixed by the By-law, but being in the discretion of the Justice, it was a fair argument to say that the intention of the Justice to inflict a penalty of two shillings and sixpence, for each offence, was sufficiently indicated by the conviction.—As the Justice had the right to inflict penalties of ten pounds each for the offences of which the petitioner was found guilty, it could not be said, that he had exceeded his jurisdiction by fining him five shillings for both.

But upon the latter ground the conviction was quashed.

SUPERIOR COURT, MONTREAL.

Before DAY, SMITH and VANFELSON, Justices.

No. 2121. { LECLAIRE.....*Plaintiff.*
 vs.
 { CRAPSER.....*Defendant.*

Held:—1o. That the interest of the vendor of real property, in a Policy of Insurance against fire, effected by the vendor previous to the sale, passed by operation of law to the purchaser, the sale being notified to the Company.

2o. That a payment made by the Insurance Company to the vendor, on a loss occurring after the sale, of a sum greater than the balance of the purchase money remaining unpaid, enures to the benefit of the purchaser as a discharge from such balance.

Jugé:—1o. Que l'intérêt du vendeur d'un immeuble, dans une Police d'Assurance contre le feu, effectuée par le vendeur avant la vente, est transféré de plein droit à l'acquéreur par la signification de la vente à la Compagnie.

2o. Que le paiement fait par la Compagnie d'Assurance au vendeur, sur une perte faite après la vente, d'une somme excédant la balance du prix d'achat restant due, profite à l'acquéreur, comme paiement de la balance.

Judgment rendered the 31st December, 1853.

This action was brought to recover £362 10s. as the balance remaining due on a sale of certain lots of land in the City of Montreal, made to the defendant on the 6th of May, 1852, by Louis François Tavernier, the balance having been transferred to the plaintiff on the 18th of July, 1853. The plea set up an agreement in the deed of sale, by which the defendant bound himself to insure the buildings on the lots against fire, to the extent of the balance sued for, and to transfer the policy to Tavernier, and an agreement by which the defendant was to have the benefit of the unexpired policy effected by Tavernier on the 24th November, 1851, in the Liverpool and London Assurance Company, for £700, by which the property was insured, to the 22d of November, 1852, the transfer by Tavernier to the defendant of the sum of £100, part of the sum mentioned in the policy, such transfer being endorsed on the policy, without date;—the destruction of the building by fire on the 8th July, 1852; the payment, by the Company, to Tavernier, subsequently to the fire, of £500, part of the amount insured, by means whereof, the said balance of purchase money was paid, compensated and extinguished.

The plaintiff, by his answer denied the agreement set up in the plea, and alleged that Tavernier had a right to recover the monies, as being his own property.

The agent of the Assurance Company proved the transfer of the £100, to have been made on the 6th of May, 1853, and the payment of the £500 to Tavernier on the 8th July, 1852. No transfer appeared on the policy, except for the £100. Agents of other Insurance Companies were examined to prove the usage and mode of transferring policies in case of sales.

DAY, Justice, stated pleadings. The question raised in this case was whether the payment of the £500 to Tavernier will discharge the purchaser, or to whose benefit did the payment enure. The pretensions of the defendant were; 1st. that the interest of the vendor vested in the purchaser by special convention ;—and 2dly., that if such convention were not proved, it passed to the purchaser by mere operation of law. On both points the Court was with the defendant, and considered the convention proved. The buildings were to be insured, and there could be but one Insurance under the circumstances. The object of the vendor was to obtain security for the balance due him. The transfer of the £100 was clearly established, and was besides formally admitted, and Tavernier's interest in the property as proprietor, ceased when the sale was perfected. It seemed to be carrying the principle a great way to say that the rights of the insured passed to the new purchaser by the effect of the sale. Nevertheless, notwithstanding the anomaly, that seemed to be the rule; as to Marine Insurance, it certainly was so, and the rule was extended to Insurances on real property. Quenault; *Assurance*, Nos. 214 to 211, and Boulay Paty there quoted. As to the equity there could be no doubt where it lay in the present case. Tavernier could not sell the property, and recover the value of it, first from the Insurance and next from the purchaser, after notification to the Insurance Company of the sale to the defendant.

JUDGMENT:—“ Considering that the defendant hath established by evidence the material allegations of his exception, and that by reason of the matters therein contained and set forth, and by law, the plaintiff ought to be barred from having the conclusions by him in his action in this behalf taken, maintaining the said exception,—doth dismiss the said action, with costs.”

DOUTRE, DAOUST and PRAIRIE, for plaintiff.
A. and G. ROBERTSON, for defendant.

SUPERIOR COURT.—QUEBEC.

Before STUART, TASCHEREAU and PARKIN, Assistant Judges.

No. 733. { HENRY Plaintiff.
vs.
{ MITCHELL Defendant.

Held : That the allegation of having suffered damages, in consequence of the protest of a bill, is sufficient to sustain the plaintiff's declaration on demurrer.

Jugé : Que l'allégé que le demandeur a souffert des dommages, en conséquence du protét d'une lettre d'échange, est suffisant pour faire renvoyer une défense en droit à la déclaration du demandeur.

Judgment rendered the 31st December, 1855.

This was an action of damages for £2000. The plaintiff alleged that the defendant had authorized him, the plaintiff, by letter, to draw upon him, the defendant, for £500. That the defendant refused to accept the bill which was protested for non acceptance. To the declaration the defendant demurred on two grounds. Firstly. Because in and by the declaration of the said plaintiff, it was not stated or alleged that there was any or what consideration moving from the said plaintiff in favor of the said defendant, for the making of the said agreement and undertaking therein alleged to have been made by the said defendant to the said plaintiff.

Secondly. Because no special damage was, in and by the said declaration of him the said plaintiff, alleged to have been sustained by the said plaintiff in consequence of the alleged nonfulfilment, by the said defendant, of the agreement and undertaking therein mentioned ; and also, that the said declaration was in other respects uncertain and insufficient.

Per curiam. Although there might be no obligation on the defendant arising out of the letter set forth in the declaration, to accept the plaintiff's draft, yet as the declaration contains an allegation that the protest was to the damage of the plaintiff's credit as a merchant, the Court thinks the action will lie ; but the plaintiff may probably encounter such difficulties at the proof under these allegations, as to preclude his ultimately succeeding.

PARKIN, dissenting :—The original undertaking being a *nudum pactum*, cannot give rise directly to any action for general damages, merely for its non fulfilment ; but had the plaintiff suffered some particular and special damage, such might be recovered, if specific facts were pleaded in such manner that the defendant might take issue upon them.

HOLT and IRVINE, for plaintiff.

PRIMROSE, for defendant.

SUPERIOR COURT.—QUEBEC.

Before STUART, TASCHEREAU and PARKIN, Assistant
Judges.

No: 558. { BELL Plaintiff.
vs.
{ WILSON Defendant.

Held : That effects upon which a defendant has a lien, will not be delivered up out of his possession, in an action of revendication, unless the amount of his claim be deposited in Court, in lieu of the effects.

Jugé : Que des effets sur lesquels un défendeur réclame un gage, ne seront point mis hors de sa possession, dans une action en revendication, à moins que le montant de sa réclamation n.e soit déposé en Cour, pour tenir lieu du gage.

Judgment rendered the 31st December, 1855.

This was an action of revendication for coals. An application was made in this case on behalf of the plaintiff that the coals attached in the hands of the defendant, and in his possession, should be delivered over to the plaintiff on his giving good and sufficient security. This was resisted on the part of the defendant on the ground that he had a lien on the coals for wharfage, and that they could not be taken out of his possession without the sum of money claimed by the defendant was deposited in Court to abide the judgment. Affidavits were filed in support of the application to the effect that the coals were exposed to fire, to depreciation and other casualties from exposure, and against it, setting forth the right of retention claimed by defendant.

Per curiam. The security offered is not sufficient—the defendant having a lien upon the coals if his claim is made out.

O. STUART, dissentiente.

Upon petition, the application was allowed subsequently in Chambers, the Plaintiff depositing the sum claimed by defendant for wharfage.

PENTLAND and PENTLAND, for plaintiff;

Ross, D. for defendant.

QUEEN'S BENCH, } **DISTRICT OF MONTREAL.**
 APPEAL SIDE.

Before **AYBWIN, DUVAL, CARON and MEREDITH**, Justices.

FRELIGH.....*Appellant*
 and

SEYMOUR.....*Respondent.*

Held:—1o. That a bequest in trust, is valid in Lower Canada.

2o. That it is not necessary in a will that the words *tu et relu* be expressed, if it be apparent by the context that this formality was observed as required by law.

3o. That in this instance, the respondent having taken possession of the estate of the testator under the will appointing him executor, the appellant, heiress at law of the testator, could not claim the estate by reason of the respondent having so taken possession, without a previous *demande en délivrance de legs*, and that such a *demande en délivrance de legs*, by the executor, after his taking possession, more than a year after the testator's death, was properly made.

Jugé :—1o. Qu'un legs fiduciaire est valide dans le Bas-Canada.

2o. Que dans un testament l'omission des mots *tu et relu*, n'est pas une nullité absolue, et ne peut invalider l'acte, s'il apporte du reste que cette formalité a été observée tel que requis par la loi.

3o. Que, dans l'espèce, l'intimé ayant pris possession des biens de la succession, en vertu du testament qui le constitutait exécuteur, l'appelante, héritière légale du testateur, ne peut revendiquer les biens à raison de cette prise de possession, non précédée d'une demande en délivrance de legs, et que cette demande en délivrance de legs portée par l'exécuteur, après cette prise de possession, et plus d'un an après le décès du testateur, a été bien portée.

Judgment rendered the 10th July 1855.

An action was instituted by the appellant, as being the only lawful child of the late Richard Van Vliet Freligh, for the recovery of all the moveable property by him left at the time of his decease, and also *en complainte* to be maintained in the possession of the immoveable property belonging to his estate.

Seymour's plea set up title to the property under a will made by the late Freligh, executed on the 20th November 1849, before Notaries. (3)

The plaintiff, by her answers, set up the nullity of the will, and particularly of the bequest of all his property to

(3) The will in question is in the following words:—

'On the twentieth day of November, in the year of our Lord one thousand eight hundred and forty-nine, before the undersigned Notary Public, duly admitted

the defendant, for the purposes mentioned ; the incapacity of the defendant to receive any bequest or execute the will, he being an alien. That by reason of such nullity and incapacity, the plaintiff, at the death of her father, became vested with all the property and rights, bonds, credits, &c., due and belonging to her father, and particularly those set forth in her declaration.

Then follows an allegation that the plaintiff, on the 11th January, 1850, accepted the succession of her father, and took possession of all the property therefo belonging, as proprietor, and that the defendant's possession is without right.

Conclusion, that the will be declared void, and that the defendant's plea be dismissed, and for judgment as prayed by the declaration.

and sworn for that part of the Province of Canada heretofore constituting the Province of Lower Canada, residing in the Village of Freleighsburg, in the seigniory of Saint Armand, in the district of Montreal, in the said Province, and the witnesses hereinafter named, personally came, appeared and was present, Richard Van Vliet Freleigh, of the said Village of Freleighsburg, Esquire, who being weak of body, but of sound mind and understanding, as appeared by his manner and conversation, and being desirous to provide for the administration and distribution of the property of which he may die possessed, hath requested of us the said Notary to receive and reduce into writing this his last will and testament in respect thereof, and which we Richard Dickenson, the said Notary, in the presence of the Reverend James Reid, of Freleighsburg aforesaid, episcopal minister, and William Samson Baker, of the same place, tanner and currier, witnesses to the due execution hereof, have taken down as dictated to us, word for word, and as follows, that is to say :—First, the said Richard Van Vliet Freleigh doth hereby will and direct, that after his decease all his just and lawful debts be paid and acquitted ;—Secondly, the said testator doth hereby will and direct that all verbal contracts, covenants and agreements, by him made and entered into with any person or persons, for and in respect to any transaction, matter or thing heretofore had, made, or done, and more particularly to letting, leasing, conveying and assuring the title or titles of any part or portion of any Village lot, or other tract or parcel of land, situated in the said Village of Freleighsburg, or any lot, tract, or parcel of land situated in the Township of Sutton, or elsewhere, in the Province of Canada, shall be fully observed and fulfilled by the executor hereinafter named, in the same manner and form as if the said verbal agreement had been reduced into writing by the said testator.

Thirdly.—The said testator doth hereby order and direct his executor, hereinafter named, to sell and dispose of all his lots, tracts or parcels of land, situated in the townships of Sutton and Clifton, for such price or consideration as may be obtained for the same ; and the monies arising from such sale or sales to be applied in the manner hereinafter mentioned. Fourthly.—The said testator doth hereby give, devise and bequeath unto his particular friend, John Brush Seymour, of the Village of Freleighsburg aforesaid, Hatter, and unto his heirs and assigns, all and singular his property, both real and personal; moveable and immoveable, wheresoever situate and being, to have and to hold the same unto the said John Brush Seymour, his heirs and assigns, for ever, upon trust, nevertheless, that the said John Brush Seymour shall and will well and truly pay or cause to be paid unto his daughter, Mrs.

Another answer alleged the will to have been procured by the suggestion and false representations of the defendant, made to the Testator while his body and mind were enfeebled, and whilst the Testator was utterly incompetent to make a will, and while his mind was instigated to hatred and malevolence towards the plaintiff. There is then alleged an unjust and forcible seizing and carrying away by the defendant of the moveables; conclusion as in the foregoing answer. The third answer to the defendant's plea sets up, the will of Mary Marvin, the plaintiff's mother, of the 4th January, 1841, her death on the 21st February following; a bequest by the testatrix to the plaintiff of all her property real and personal; the existence of a community of property between her father and mother at her mothers death, and the continuance thereof.

Then follow allegations that the plaintiff was rightfully

Jane Freigh, widow and relict of the late John Baker, in his lifetime of the township of Durham, gentleman, deceased, the annual sum of seventy five pounds current money of this Province, from and after the day of the decease of the said testator, for and during the natural life of the said Jane Freigh, but not further; and the said testator doth hereby declare that the said sum of seventy five pounds, per annum is only made and given to the said Jane Freigh upon condition that she is satisfied, therewith; but in case she the said Jane Freigh should at any time hereafter institute an action in any of the Courts of this Province against the Executor of the said testator; for and in respect of the estate and succession of the late Mary Marvin, in her lifetime the wife of the said testator, deceased, or to distract or interrupt the will and testament by her made and executed in favor of the said testator, that then and in any such case the said testator doth hereby revoke the bequest of the said sum of seventy five pounds per annum to the said Jane Freigh, so made and given to her as aforesaid, any thing herein before contained to the contrary in any wise notwithstanding, if any such action should be made or instituted by her during her natural life.

Fifthly.—The said testator doth hereby order and direct the said John Brush Seymour to invest, in good security, any surplus capital or cash he may derive out of the lands and premises of the said testator, at an annual interest of six per centum, for the purpose hereinafter mentioned; and with respect to dividends arising from Bank Stock belonging to the said testator, he doth order and direct the said John Brush Seymour, whenever any such dividends shall be received by him from time to time, the said dividends to be reinvested in good security for the sole purpose to accumulate a sum to cover all claims that may hereafter be made upon the said testator's estate by the heirs or legal representatives of his brothers and sister, Carlton Freigh, Rodney Freigh, and Gertrude Freigh.

Sixthly.—The said Testator doth hereby order and direct the said John Brush Seymour, to lease, let and convey, to any person or persons, wishing to acquire the same, any Village lot or emplacement upon and for such rents, conditions and consideration as to the said John Brush Seymour shall seem meet; and Seventhly, the said Testator doth hereby declare, that should his daughter, the said Jane Freigh, depart this life, leaving issue of her body, lawfully begotten, the said issue, so lawfully begotten, shall be the universal legatee of the said Testator, of all his property, real and personal, moveable and immoveable, whereof the same is so given and granted unto the said John Brush Seymour, in trust, for the purposes aforesaid; and

seized, as proprietor, of all the property mentioned in her declaration, which property belonged to the said community, that the will was made "by a fraudulent and wrongful conspiracy between the said Richard V. V. Frelich and the defendant, to defraud the plaintiff of her just rights."

Then follows a general answer to the plea, and a replication to the *défense en fait*.

Subsequently, an action *en délivrance de legs* was instituted by John B. Seymour, as executor and universal legatee, *in trust*, of the said Richard Van Vliet Frelich, and of the late Mary Marvin his wife, deceased.

After reciting part of this will, Seymour alleged the death of R. V. V. Frelich on the 11th January, 1850, also the death of Mary Marvin, his wife, and that Jane Seymour

if the said Jane Frelich should depart this life without leaving aby such issue of her body, lawfully begotten as aforesaid, that then and in that case the said Testator doth hereby give, devise and bequeath the reversion of the property, both real and personal, moveable and immovable, from and after the decease of the said Jane Frelich, in further trust unto the said John Brush Seymour, his heirs and assigns, for ever, to apply the rents and revenues of the said real and personal property, to the tuition and advancement of learning in the aforesaid Village of Freelighsburg, wherein a Grammar School shall be established, the Preceptor of which said school shall be competent to instruct the scholars of the school to be established as aforesaid, in the Greek and Latin languages, and to and for no other use, intent or purpose, whatsoever, from and after the day of the decease of the said Jane Frelich and thenceforth for ever; and for the execution of the present will and testament, the said Testator doth hereby nominate and appoint the said John Brush Seymour to be the sole Executor of the said Testator, hereby disesising and divesting himself of all and singular his property for the end hereof, and hereby revoking all other wills, testaments and codicils that he may have made prior to the present, to which alone he doth adhere as containing his true intent and last will.

Thus done and declared, word for word, by the said Testator to us the said Richard Dickenson, and published and declared as and for his last will and testament, at the house and residence of the said Testator, in the aforesaid Village of Freelighsburg, in the presence of us the said Notary and witnesses, on the day and year first above written, in the afternoon.

In faith and testimony whereof, the said Testator hath to these presents, first twice duly read, set and subscribed his name and signature, in the presence of said witnesses, and of us the said Notary, which said witnesses, in his and our presence, and in the presence of each other and at his request, have hereunto set and subscribed their respective names and signatures with us the said Notary, also hereunto subscribing under the number two thousand seven hundred and fifty.

(Signed) R. V. V. Frelich, James Reid, Wm. S. Baker, R. Dickenson, N. P.

As appears by the original of record in my office and of which I do hereby certify the foregoing to be a true and exact copy.

Signed, R. Dickenson, N. P.

was issue of their marriage. He further alleged that as such heiress of the said Richard V. V. Frelich, she held all the real and moveable property belonging to the said R. V. Frelich and refused to deliver it over to the Plaintiff, and prayed generally for a *délivrance* of the same, as also for an account of the rents, issues and profits thereof.

The pleas were—first, an exception, setting out that the late R. V. V. Frelich, at his decease, was possessed of no other property than his share in the community which existed between him and the late Mary Marvin, his wife, mother of the said Jane Frelich,—the latter, after Mary Marvin's decease, being entitled, as well as heiress at law, as in her quality if universal legatee of her mother, to all her mother's estate, and, consequently, to a half share of said community property ; and as to the other half, she was also entitled to it, because the pretended last will and testament, set up by the respondent, had been procured to be made by him by fraud and suggestion and the exercise of undue and improper influence over the said late Richard V. V. Frelich during his last illness, and while he was in a weak and unfit state of body and mind to make a will : that profiting by the absence of the said Jane Frelich, and the imbecile state of body and mind of the deceased R. V. V. Frelich, the respondent had intruded himself into the residence of the deceased, and assumed and exercised full control and disposal of himself and his household, and procured the pretended will to be made, purposely keeping the appellant, Jane Frelich, in entire ignorance of the dangerous state of her father's health ; that her father had made a will, in her favor, before the respondent had acquired so great an influence over him, viz., on the 28th September, 1849 ; that immediately upon the decease of the late Richard V. V. Frelich, in the absence of the appellant, before the body was interred, and in the night time, the respondent had, in a scandalous and indecent manner, stripped the house in the village of Freelightsburg, where the deceased resided—

the same being the property of the appellant, Jane Frelich—of all its contents, furniture, and other property, and secreted and carried away large sums of money, and refused to exhibit any kind of inventory of such property, or give any account thereof.

That the said Richard V. V. Frelich was an alien, born in the United States, and never naturalized as a British subject, and incapable of bequeathing or conveying by will; that the respondent was likewise an alien, and incapable of receiving a bequest; that the pretended bequest to establish a Grammar School was null and void, and the will was also null and void.

Secondly.—*A défense au fonds en fait.*

By an incidental demand, the appellant set up the same matters as contained in the exception, concluding for the nullity of the will, and that the respondent be held and bound to account for and restore the property by him taken.

The answers and plea to the incidental demand are substantially general denials of the appellant's allegations.

The respondent produced a deed from the Sheriff of Montreal to the late Richard V. V. Frelich, of date the 21st April, 1838.

A copy of the will executed before Dickinson, Notary, and witnesses, 20th November, 1849.

The appellant produced copy of probate of will of the late Mary Marvin, executed 4th January, 1841, making Jane Frelich her universal legatee.

Copy of deed of donation, from John S. Porter to Mary Marvin, wife of Richard V. V. Frelich, executed 8th June, 1835, of the property and house where the late R. V. V. Frelich died.

Copy of a will executed by the late R. V. V. Freilih,
28th September, 1849.

All the evidence adduced, of the appellant, Jane Freilih's, possession of property, is in her answer to *interrogatoires sur fails et articles*, wherein she admits that she is in possession of the community property.

The judgment on the action *en revendication* is in the following terms :

Present : The Hon. Mr. Justice DAY,
 " " Mr. Justice SMITH,
 " " Mr. Justice MONDELET.

" The Court having heard the parties by their Counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon, considering that the plaintiff hath failed to establish by evidence the material allegations of her declaration, and that the defendant hath proved the matters by him alleged in his exception, in the said cause filed, set forth, and by reason thereof, and by law, was and is entitled to take and hold possession and seizin of the goods, chattels and effects in the said declaration mentioned, in his capacity of executor of the last will and testament of the said Richard VanVliet Freilih, for the execution of the said will ; and considering that the plaintiff, under and in support of the special answers by her in the said cause pleaded, hath not proved any matter or thing by reason whereof the said last will and testament ought to be declared or held null and void, or by reason whereof she ought to have other the conclusions by her in the said answers taken, doth maintain the said exception of the Defendant and dismiss the action of the plaintiff," etc., etc.

The court below rendered the following judgment on the demande *en délivrance de legs*.

" The court having heard the parties, by their Counsel,
" upon the merits, as well of the principal demand as of
" the incidental demand, examined the proceedings, proof
" of record, and having deliberated thereon, considering
" that the plaintiff hath established, by evidence, the ma-
" terial allegations of his declaration, and that the defen-
" dants have failed to prove that the will in the said decla-
" ration mentioned and set forth, was made by the late
" Richard Van Vliet Freligh, by the procurement of the
" plaintiff, or in consequence or by reason of any undue or
" improper influence or suggestion or false representations,
" by him exercised over, or made to the said late Richard
" Van Vliet Freligh, or that the said late Richard Van Vliet
" Freligh was an alien, or that the said plaintiff is an alien,
" or any other matter or thing in their exceptions in the said
" cause pleaded contained, by reason whereof, and by law,
" the plaintiff ought to be prevented and barred from having
" the conclusions by him in his declaration taken. Dis-
" missing the said exceptions, doth adjudge and condemn
" the said Jane Freligh, as the sole heiress at law of the said
" late Richard Van Vliet Freligh, her late father, within
" thirty days after service upon the defendants of this judg-
" ment, to make delivery to the said plaintiff of the legacy
" (*délivrance de legs*) in the said will contained, to wit, of all
" and every the estate, real and personal, moveable and
" immovable, of the said testator, and to deliver up the
" same, and more particularly a lot of land mentioned in
" the deed of sale, passed on the twenty-first day of April,
" one thousand eight hundred and thirty-eight, by Roch de
" St. Ours, Sheriff of the district of Montreal, to the said
" late Richard Van Vliet Freligh, being the lots known as
" the equal half of lot number twenty-nine, and equal half
" of lot thirty, situated at Frelighsburg, containing two hun-
" dred acres more or less, with the exception of certain
" emplacements therein also described—and to account for
" and deliver up all and every the fruits and interests,
" rents, issues, and profits thereof, to the said plaintiff; and

" in default thereof, it is adjudged and declared that this judgment be and stand as such delivery (*délivrance de legs*) for all and every the purposes and effects required and contemplated by law ; and that the said plaintiff, in his said capacity, be put in possession of the same, and of every part thereof, the whole with costs against the defendants.

" And the court, considering that the incidental plaintiffs have failed to prove the material allegations of their said incidental demand, doth dismiss the said incidental demand with costs."

In the argument upon the appeal, it was contended, on behalf of the appellant, that the will of the said R. V. V. Frelich was void for want of the formalities required to give authenticity to the said will, (1) the same not having been written in the presence of the witnesses ; not containing the averment that it had been *dicté et nommé* ; (2) nor that it had been read over (*relu*) to the testator (3) nor in presence of the witness (4). That the will was null by reason of suggestions made by the said Seymour at the time of the execution of the said will (5). It was also contended that the said Seymour was not *fideicommissaire* nor *fiduciaire* (6) and that the legacy to him was null ; that the bequest to

(1) 9. Duranton, Donations et Test : p. 100, No. 66 :—5 Zacharie, Droit Civil Français, part. 2, liv. 2, p. 100, note :—4 Grande Cour. Ferrière, art. 287, pp. 181-2, No 7.

(2) 4. Grande Cour. Ferrière, art. 289. Nos. 9, 10, 11, 12 and 13, p. 108 :—Ibid. pp. 74, 118, No. 30 :—Ricard, Donations, part. 1, cap. 5, Sect. 6, No. 1502, p. 346, Nos. 1504, 1505, Nos. 1512, 1513, 1514, 1515 and 1526 :—9 Duranton, No. 70, p. 203 :—1 Grenier, Donations, part 2, cap. 1, Sec. II. No. 231 :—5 Toullier, No. 415.

(3) 4. Ferrière, Cour de Paris, tit. XIV des Test. p. 69, No. 16 :—Ibid art 289, p. 108, No. 9 :—5. Zacharie, Droit Civil, part. 2, liv. 2, p. 103 :—2. Delvincourt, notes to p. 84, No. 8, p. 303.

(4) 5. Zacharie, part. 2, liv. 2, p. 101 :—11. Duranton, pp. 116, 117, No. 88 :—13. Merlin, Report. vbo. Test., sec. 2 et 3, art. 2, No 4 ter :—Dallas, Dict. de Jurisp. vbo. Test. Nos. 418, 421, 422 et 428 :—Ibid. Nos. 488, 489, 490, 491, 492, 493 et 494 :—2. Delvincourt, Cours de Code Civil, p. 48.

(5) Pothier, Cour d'Orléans, tit. XVI, p. 489, No. 29 :—Ibid, Donations Test., cap. 2, art. 7, p. 326 :—1. Ricard, Donations, part. 3, cap. 1, No. 17, p. 446 :—1. Fargole, c. 5, No. 39 :—7. Daguesseau, p. 436 :—1. Jamson on Wills, pp. 36 and 40 :—Guyot, Report. vbo. Suggestion, p. 597.

(6) 5. Marcadé, Testaments, p. 145, No. 205, p. 152 :—Thevenot, Substitutions, pp. 6, 414 :—6. Toullier, No. 416, p. 380, No 415, 422, 423, 424, 715 :—32. Merlin, Substitution Fidéi, p. 89 :—Daguesseau, Substitution, p. 125.

and in favor of a common school is null under the Edit. of 1743, (1) and that the will had not been published and registered according to law, *publié et insinué*. (2) The appellant moreover complained that the judgment instead of granting *délivrance de legs*, generally, as prayed for, awarded to the said respondent a certain real property which was part of the community which had existed between the said Richard V. V. Frelich, and his late wife, Mary Marvin, who had died after instituting the appellant her universal legatee.

On behalf of the respondent, it was contended that the judgment of the Court below was according to law and justice ; that the will of the late Richard Van Vliet Frelich was regular in its form, (3) that the trust contained therein was valid as such trust. (4) That he was in consequence entitled to a *délivrance de legs* of all the estate of the said Richard Van Vliet Frelich.

AYLWIN, Justice, dissentiente :—The question in this cause is as to the validity of a will, which is of a peculiar character, and such as to give rise to contestation, M. Richard Van Vliet Frelich, by his will received before notaries on the 20th november, 1849, after providing for the payment of his debts and execution of contracts entered into by him, and directing the sale of certain Village and Township lots to him belonging, by his executor, bequeaths to the respondent, and unto his heirs and assigns, all his property both real and personal, to have and to hold the same for ever upon trust, provided nevertheless that the said respondent

(1) 1 Edits et Ord. p. 536.

(2) 1. Ricard, Donations, part. 1, cap. 4, see. 3, dist. 7, No. 1233, p. 284 :—
4. Grande Cour. Ferrière, p. 27, No. 4.

(3) 5. Toullier, p. 416 :—Ibid from No. 426 to 431 :—Ibid, p. 104 :—Merlin, Questions, vbo. Testaments, sec. 2 et 4 :—5 et 6. Dalloz, Jurisp. du Royaume, vbo. Dispositions Entrevis, p. 436 :—2. Bourjon, Donation, p. 670, No. 23 :—1. Granier, Donations, Nos. 239, 240, 36, 38, 42, 44 :—Guyot, Report. vbo. Testament, p. 162 :—Journal de Cassation, 1818, p. 639 :—Dalloz, Recueil, 1850, Richard vs. Charbonneau, p. 269 :—Arrêt de Brillon, vbo. Testament, p. 646, No. 133 :—6. Journal des Audiences, p. 354 :—24. Journal de Cassation, p. 413.

(4) 2. Furgole, Testaments, p. 125, No. 4 :—20. Merlin, Report. vbo. Mode, pp. 350, 1, 2 :—12. Idem vbo. Fiducitaire, pp. 184, 6, 7 :—Guyot, Report. vbo. Fidéicommiss, p. 360 :—2. Furgole, Test. p. 75, Nos. 24, 25, 22, 23, pp. 77, 8 :—Ward on Legacies, p. 132 :—Nouv. Denisart, vbo. Execut. test :—Cain-Delisle, Code Civil, p. 378 :—7. Vesey's Rep. p. 324 :—14. Geo. 3 :—41. Geo. 2.

should pay, or cause to be paid, unto the said appellant, daughter of the testator, the annual sum of £75 for and during her natural life, upon condition that she should be satisfied therewith ; but in case she should at any time institute an action against the Executor, for and in respect of the estate and succession of the late Mary Marvin, her mother, or to disturb or interrupt the will and testament by her made and executed in favor of the said testator, that then the said bequest of £75 should be revoked.

The testator orders the investment in good security of the surplus capital or cash to be derived from his lands and premises ; and that the dividends from Bank Stock should also be reinvested for the purpose of accumulating a sum to cover all claims that might thereafter be made upon his estate by the representatives of his brothers and sisters. 7thly He declared that in case his daughter had issue, that such issue should be his universal legatee ; and in default of such issue he gave the reversion of all his property, in further trust unto the " respondent, his heirs and assigns, to " apply the rent and revenues thereof to the tuition and ad- " vancement of learning in the said village of Freightsburg, " wherein a grammar school shall be established, the pre- " ceptors of which school shall be competent to teach the " Greek and Latin, and to and for no other use, intent or " purpose whatsoever."

This will is very singular, but the circumstances of the death of the testator were also extraordinary. This testator appears to have been a man of strong mind and intellect, yet at the time of the execution of this will, when he was lingering on his death bed, he seems to have been under the control of the respondent, and of a servant maid who attended him, and even before he had ceased to breath, his papers had been taken away and removed from the house. It was only sometime after the death of her father that these facts came to the knowledge of the appellant. She brought an action against the respondent *en revendication* for the

universalité of the moveable, and of *complainte* as to the real estate of her late father, which she claimed as his legal heir. No objection was raised as to her capacity, but the respondent, as Executor, instituted, against the appellant, an action *en délivrance de legs* which was resisted on the grounds of the incapacity of the testator, alleged suggestions, in the absence of the appellant, and informalities in the will itself.

The Court below has overruled the objections in regard of the informalities alleged by the appellant. In ordinary cases it is not for Courts of justice to supply exceptions, unless where public policy requires it; but in this case, I believe it to be my duty to express my opinion on the trust contained in this will, and the bequest to the grammar school; and I am ready to do so. This bequest is in my view null, as being an attempt by a private individual to make an establishment or corporation contrary to the law of the land. However praiseworthy the object may be, no private citizen can create such establishment, and on this point the Roman law, as well as the French law, and our Canadian law have the same provisions. There is a *déclaration* of the King of France of the year 1743, registered here in the *Conseil Supérieur*, and made expressly for this Country, the first and second articles whereof are in point, the second forbidding all such bequests, even those in favor of persons intrusted with the formation of such corporations. This declaration underwent the examination of the Court of appeals in a case of Dunière, appellant, and the Church wardens of the Parish of Varennes, and received the sanction of the Court, who decided accordingly. Our statute 41 Geo. 3, ch. 4, has maintained the rule laid down by the *déclaration* of the King of France, in the proviso attached to the first section. We find also in Vesey's Reports a case before the Chancellor, of Blandford vs. Patrol, where a similar bequest for the establishment of a school was declared to be in contravention of the statutes of *mortmain*.

In this case we have a bequest in favor of the respondent,

his heirs and assigns for ever, in trust ; here is a perpetual corporation created by the will. Now if this disposition were illegal what is it that can be the matter of a *délivrance*. If Jane Frelich, and her heirs, cannot obtain the residuum, surely, Seymour cannot claim it for himself under the will. I would therefore be disposed to set aside the will on account of the illegality of this main bequest. Another reason would induce me to dismiss the action *en délivrance de legs* of the respondent. It is not sufficient for a party to obtain *délivrance de legs*, to come before the Court with a title in due form of law. The Court will not grant his prayer if there is any thing suspicious against him. Here there is no registration, insinuation or publication of the will of the late R. V. V. Frelich, at least there is no evidence of any. Of what does the Respondent ask *délivrance*? It is of property whereof he has already taken possession. As Executor his first duty was to cause an inventory to be duly made and executed ; there is, it is true, in the record a document purporting to be an inventory, but it cannot be considered an inventory such as required by law. Seymour's action was instituted a year and ten days after Frelich's death, and although the appellant's action had first been instituted, still the fact does not appear of record, in the demand *en délivrance de legs*. I would therefore have dismissed the respondent's action, *sauf à se pouvoir*, leaving him to his recourse, in case he could show an inventory duly made, and security given. As to the other action I would reject all that is *en complainte* ; but as it is in evidence that the respondent took possession of the estate illegally and without the presence of the heir, or process at law, and before the interment of the testator, I would order Jane Frelich to be reinstated in possession of the estate, the maxim is *spoliatus ante omnia restituendus*.

DUVAL, Justice :—The main questions here submitted are these : Is the will null? Was it obtained by suggestion or when the testator was of unsound mind and incapable of making a will? On the first point the majority of the Court

is of opinion that part of the will is valid, and that so far, it may be sustained. As to the inability of the testator, there is no evidence of record.

We are convinced that the testator was a man of strong will and was determined to dispose of his property as he liked ; his disease was not one affecting his mind. There is no kind of evidence that Seymour suggested the will. The only facts proved are the frequent visits of Seymour during the testator's illness, but nothing shows that more attention was paid to the testator than was required of Seymour by his duty both as a neighbour and as having married a relative, I believe, a niece of the testator ; as to the alleged informalities, and the omission of the words *lu et reli*, we cannot give to the law a construction which would affect wills so that not one in ten could be maintained. The execution of the will in question appears in due form, from the contents of it taken together, and from the certificate of the notary. All the judges agree in this. As to the provisions of the will itself, the Court sees nothing but what is proper and reasonable. The testator had but one child, he seems to have had no confidence in her ability to wind up his estate, and, besides, appears to have had differences with her, and therefore selected the respondent for that purpose. He gives him precise directions as to how his property is to be disposed of, directs that £75. per annum, shall be paid to his daughter on condition of her not taking steps to claim her mother's estate. The appellant not being able, in the opinion of the testator, to administer the estate, would have required an agent to do so ; the testator as he had a right to do, appointed that agent, whatever be the name given to him, whether executor, administrator, trustee, or any other—as to the question of the *trust* for the establishment of a school, it cannot be decided in this cause. That question can be raised only after the death of Jane Frelich, without issue, and in the interest of her natural heirs at law. This Court must carry out the intentions of the testator so far as they may be found legal, and it is plain

the appellant is not, and can never be, in a condition to raise that question. The testator had a right to limit her interest in his estate to £75, *per annum*, and the Court cannot restrain the exercise of that right. In declaring part of the will valid, reserve is made to the parties who may hereafter have an interest in the estate to contest the validity of the bequest toward the establishment of a school.

As to the action of Jane Freilih, the ground on which it is based is the manner in which Seymour took possession of the papers and valuables of the estate. It is in evidence that the appellant had no domicile at Freilihburg, nor is there proof that Seymour knew where she lived. There were only servants in the house, and if the property had disappeared none but the executor could have been blamed. We look upon his acts as done for the preservation of the estate, and as a commencement of the execution of the trust imposed upon him.

MEREDITH, Justice :—After what has fallen from my learned colleagues, I will content myself with observing that I express no opinion as to the validity or invalidity of the bequest to the grammar school. The question does not arise here. But it is plain to me that even if one clause of the will were bad, that could not vitiate the rest. The case before the Lord Chancellor, cited from Vesey, does not make against this, for all the clauses in the will, not held to be illegal, were ordered to be carried into effect. As to the formalities, I am of opinion that the will is formal in all its parts, and that the testator was of perfectly sound mind, and that there is no evidence of suggestion, as to the question raised by one of the Counsel for the defendant, as to the capacity of the respondent, I hold he is a *fiduciary* legatee ; a quality which, in my opinion, is recognized in our law, and which, to my knowledge, has been upheld in all the Courts of the Province in cases in which I have been interested, and where large properties were involved.

CARON, Juge :—L'on demande à l'héritière la reconnaissance de la validité du testament de son père, (père de l'appelante) par lequel l'intimé est nommé exécuteur testamentaire et légataire fidéicommissaire. Le jugement en Cour Inférieure a reconnu la validité du testament et a ordonné qu'il serait exécuté, mais il a été trop loin en accordant la saisine et possession de certains immeubles de la succession en particulier, tandis qu'on aurait dû se contenter de décréter la délivrance en général, sans particulariser. Sous ce rapport le jugement doit être réformé. La prétention de l'appelante est que le testament est nul, le testateur (son père) n'étant pas *compos mentis* lorsqu'il fut fait, et aussi pour plusieurs défauts qu'elle invoque. Sur ces points tous les juges sont d'accord que l'appelante a tort. Mais elle prétend encore que le testament est nul parceque, sous certaines contingences, la plus grande partie des biens légués devra être employée par l'intimé à promouvoir l'éducation dans une certaine localité, dans laquelle devra être fondée une école de grammaire où l'on enseignera certaines branches d'instruction. L'on dit que c'est un legs fait à une institution qui n'existe pas, et qui, partant, ne peut prendre ; que de plus c'est léguer à main-morte des immeubles et une universalité de meubles, ce qui est nul ; que pour ces raisons le testament est nul *in toto*. L'on répond d'abord que le legs n'est pas fait à une main-morte ni à une institution qui n'existe pas, il est fait à l'intimé, ses hoirs et ayant causes, mais à la condition qu'il emploiera le produit des biens légués à promouvoir l'éducation, et qu'à cette fin, entre autres, il établira une école, et c'est à l'intimé que le legs est fait. S'il ne remplit pas les conditions qui lui sont imposées il devra y avoir un moyen de l'y contraindre. Mais pour le moment ce n'est pas là la question, et ce n'est pas à l'appelante qu'il appartient de la soulever dans les circonstances. Le testament est fait pour rencontrer deux éventualités bien distinctes. Dans l'une comme dans l'autre desquelles, l'appelante ne doit recevoir que la rente de £75 par année, qui doit lui être payée sur les biens

léggués à l'intimé, sous forme de rente viagère tant quelle vivra, c'est là tout ce quelle doit avoir de la succession de son père en vertu du testament. Dans la première partie du testament, le testateur prévoit le cas où sa fille, sa seule héritière, laissera des enfants à son décès. Dans ce cas après avoir réglé comment seront gérés et administrés ses biens par le légataire, ses hoirs ayant causes, tant que vivra l'appelante, il ordonne qu'à la mort de cette dernière la propriété de tous ses biens passera aux enfants quelle laissera. Et alors l'administration de l'intimé prend fin. Mais jusqu'à cette époque, sans doute, il doit faire ce qui lui est ordonné. Dans la seconde partie du testament, le testateur prévoit le cas où sa fille décèdera sans enfants. C'est dans cette hypothèse, et à compter de cette époque seulement, que le produit des biens doit être employé à l'éducation, et c'est alors qu'il faudra voir qu'il y ait une école. Dans ce cas ce n'est ni l'école ni l'instituteur qui géreront les biens, mais c'est l'intimé et ses représentants qui paieront ce qui sera nécessaire à cette fin. Le testament est valable même dans cette seconde hypothèse, et cela suffit pour faire réussir l'intimé. Pour le moment, le testament est exécutable et il doit être exécuté, ce n'est parce qu'il peut y avoir des difficultés dans l'avenir qu'il faut empêcher l'exécution de ce qui n'en connaît pas.

The judgment in the action *en délivrance de legs* is in the following words :

The Court....considering that in the rendering of the judgment of the Court below there is no error, doth affirm the same, Hon. Mr. Justice Aylwin, dissenting.

The judgment on the action *en délivrance de legs* is in the following words :

The Court &c....considering there is error in that part of the judgment pronounced by the Court below, on the 19th day of October, 1852, which adjudges and condemns the

said Jane Frelich, as sole heiress at law, of R. V. V. Frelich, her deceased father, to deliver up to the said plaintiff, in the said Court, a lot of land mentioned in the deed of sale executed on the 21st April, 1838, by Roch de St. Ours, sheriff of Montreal, to the said R. V. V. Frelich, doth reverse, annul and set aside the judgment so pronounced by the said Court on the 19th October, 1852, and this Court proceeding to render the judgment which the Court below ought to have given ; considering that the appellant hath failed to establish that the will of the said late R. V. V. Frelich, in the declaration mentioned, and in part set forth, was made by the procurement of the respondent, Seymour, or in consequence, or by reason of any undue or improper influence, suggestion or false representations, by the said Seymour exercised, and made to the said testator, or, that the said Seymour was an alien : considering, further, that the said Jane Frelich hath failed to establish any matter or thing in the exceptions pleaded contained, by reason whereof, and by law, the said J. B. Seymour ought to be prevented and barred from obtaining the conclusions by him taken in his declaration in the Court below : doth dismiss the said exceptions, and doth adjudge that the last will of the said R. V. V. Frelich, received by Dickinson, notary, and witnessess therein named, on the 20th November, 1849, be executed according to its tenor and effect, and doth adjudge and condemn the said Jane Frelich, as the sole heiress of her deceased father, within sixty days after the service made upon her of this Judgment, to make delivery, to the said J. B. Seymour, of the legacy (*faire délivrance du legs*) in the said will contained, in favor of the said J. B. Seymour, of all the estate, real and personal of the said late R. V. V. Frelich, and to account and deliver up to the said Seymour the rents, issues and profits, *fruits et revenus*, thereof, from the 13th day of February, 1851, date of return of process in this cause, and in default thereof, it is adjudged and declared that the present judgment be and stand as such delivery of legacy, for each and every the purposes by law required, and that the said J. B. Seymour, in his

capacity aforesaid, be put in possession of the same. The Court reserving to the lawful heirs of the said R. V. V. Frelich, in the event of the said Jane Frelich departing this life without lawful issue, the right of contesting the provisions in the said will contained, respecting the advancement of learning in the matters provided in the said will, and also such recourse as the said Jane Frelich may lawfully exercise for the recovery of the lots of land in part described in the judgment of the Court below.

CROSS & COFFIN for appellant.

ROBERTSON, A. & G. for respondent.



AN INDEX OF THE PRINCIPAL MATTERS.

ACTION *en partage*.

Held:—That in an action by the heirs of a wife *commune en biens*, against their father, praying to be declared proprietors of one half of a farm belonging to the *communauté*, it is necessary to specify which half, if a partition has taken place, and if not, to pray for such partition by the declaration.

Lalonde et al vs. Lalonde.

Jugé:—Que dans une action par les héritiers d'une femme commune en biens, contre leur père, concluant à ce qu'ils soient déclarés propriétaires de la moitié d'une terre, il est nécessaire d'indiquer quelle moitié est réclamée, s'il y a eu partage, sinon, de conclure à tel partage par la déclaration.

97

ADMIRALTY CASE.—*Ship's Articles*.

Held:—That seamen brought to Quebec under articles of agreement in which the engagement is expressed thus:—"The several persons whose names are hereto subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports and places in the Mediterranean and Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," are entitled to, and can sue for their wages in Quebec, and cannot be compelled to return in the ship to a final port of discharge in the United Kingdom.

Jugé:—Que des marins amenés à Québec en vertu d'un contrat dans lequel l'engagement est ainsi exprimé:—"Les personnes dont les noms sont respectivement souscrits aux présentes, s'engagent de servir à bord du dit vaisseau en les capacités apposées vis-à-vis leurs noms respectivement, dans un voyage du port de Liverpool à Constantinople, de là (s'il est nécessaire) à aucun port ou place dans la Méditerranée ou la Mer Noire, ou dans aucun autre endroit où l'on pourra se procurer du fret, avec la faculté d'entrer dans un port pour y prendre des ordres, et jusqu'au retour final du vaisseau dans un port du Royaume-Uni pour y décharger, ou pour un terme qui n'excédera pas douze mois," ont droit et peuvent poursuivre pour leur gages à Québec, et ne peuvent être contraints de rester à bord jusqu'au retour du vaisseau dans un port du Royaume-Uni pour y décharger.

The Varuna.

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AMEUBLISSEMENT.

Held:—That a covenant in a marriage contract that “the parties take one another with the property and rights to each of them respectively belonging, and such as may thereafter accrue, of what nature soever, which said property moveable or immovable shall enter into the community” is a covenant of *ameublement* of all the property belonging to the parties, notwithstanding a subsequent clause of *réalisation*; and that consequently the customary dower cannot be claimed out of the husband’s *propres*.

Jugé:—Que la stipulation dans un contrat de mariage que “les futurs époux se prennent avec leurs biens et droits à chacun d’eux appartenants, et tels qu’ils pourront leur échoir ci-après, à quelque titre que ce soit, lesquels dits biens meubles ou immeubles entreront dans la dite communauté” est un ameublement général de tous les biens des conjoints, nonobstant clause de réalisation subséquente; et que le douaire coutumier ne peut conséquemment être réclamé sur les propres du mari.

Moreau vs. Mathews.

325

ARBITRATION.—*Railway case.*

Held:—1. That in Lower Canada Notaries have the power to receive the report of arbitrators and to give certified copy of the swearing in of the arbitrators annexed thereto, and that such power is specially recognized as belonging to them by the Statutes 2 Will. IV, ch. 58, and 13 and 14 Vict. ch. 114.

2. That the assessment of costs by arbitrators named under the provisions of the Statutes above mentioned does not vitiate their report.

Jugé:—1. Que dans le Bas-Canada, les notaires ont le droit de recevoir les sentences arbitrales et délivrer des expéditions authentiques de telles sentences, ainsi que du certificat de prestation de serment des arbitres qui peut y être attaché, que normément tel pouvoir leur est reconnu par les Actes des 2 Guil. IV, ch. 58, et 13 et 14 Vict. ch. 114.

2. Que la liquidation des dépens par les arbitres nommés sous l’opération des Actes sus-mentionnés ne vici pas le rapport.

Tremblay and Champlain and St. Lawrence Railroad.

219

ATTACHMENT.—*vide CAPIAS.*

BAIL TO SHERIFF, LIABILITY OF.

Held:—That Bail to the Sheriff, for a Defendant arrested on a *Capias ad Respondendum*, are only liable for the amount stated in the bailbond, and not for the full amount of the judgment rendered against such Defendant.

Jugé:—Que les Cautionnements au Shérif, pour un Défendeur arrêté sur un *Capias ad Respondendum*, ne sont responsables que pour le montant mentionné dans le cautionnement, et non pour le montant en entier du jugement rendu contre tel Défendeur.

Joseph vs. Cuvillier.

94

BAILIFF.—*Sale of Moveable Effects.*

Held:—That a bailiff has no action for the recovery of the price of goods seized and sold *en justice*, against the purchaser to whom he has delivered these goods previously to his being paid.

Pelletier vs. Lajoie.

Jugé:—Qu'un huissier n'a point d'action pour le recouvrement du prix d'effets saisis et vendus en justice, contre un adjudicataire auquel il a livré ces effets sans se faire payer.

394

BOOKS OF ACCOUNT, SEIZURE OF.

Held:—That books of account, *titres de créance* and papers of the Defendant, in his possession, are exempt from attachment, *sont non saisissables*.

Fraser vs. Loiselle.

Jugé:—Que les livres de comptes, titres de créances et papiers du Défendeur, en sa possession, sont non saisissables.

299

CAPIAS.

1. Held:—That an affidavit to obtain a *Capias* contains sufficient grounds for the belief of the Defendant's departure, with a fraudulent intent, if it is stated that the Defendant refuses to pay the sum sworn to be due; that the vessel of which he is master is immediately about to sail for Europe, and that the Defendant is to sail therein.

Lefebvre vs. Tullock.

Jugé:—Qu'un affidavit pour obtenir un *Capias* contient des raisons suffisantes pour la croyance du départ du Défendeur, dans la vue de frauder le déposant, s'il y est dit que le Défendeur refuse de payer la somme alléguée être due; que le navire dont il est capitaine est sur le point de faire voile pour l'Europe, et que le Défendeur est sur le point de faire le voyage à bord ce navire.

42

2. Held:—1. That a *contrainte par corps* by *Capias ad Satisfacendum* may issue, against a debtor refusing to open his doors to the bailiff charged with a writ of execution against him.

2. That in the case submitted the returns of the bailiff are sufficient proof to justify the issuing of such *Capias*.

3. That an appeal lies from the judgment awarding such *contrainte par corps*, in like manner as from any other judgment from which an appeal is granted by law.

Mercure and Laframboise.

Jugé:—1. Qu'il y a lieu à la contrainte par corps par *Capias ad Satisfacendum* pour refus des portes, par un débiteur, à l'huissier chargé d'un bref d'exécution contre lui.

2. Que dans l'espèce la preuve résultant des rapports de l'huissier chargé d'exécuter est suffisante pour justifier la contrainte.

3. Qu'il y a droit d'appel du jugement ordonnant la contrainte par corps dans ce cas, de même que de tout autre jugement dont l'appel est accordé par la loi.

168

3. Held:—That an affidavit for a writ of *capias ad respondendum*, made by the Book-keeper of a branch of the Bank of Upper-Canada, is sufficient.

Bank of Upper-Canada vs. Aluin.

Jugé:—Qu'un affidavit pour un writ de *capias ad respondendum*, fait par le teneur de livre d'une succursale de la Banque du Haut-Canada, est suffisant.

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4. Held :—That the allegations contained in an affidavit for a *Capias*, enumerated in the report, are sufficient.

Tessier vs. Pelletier.

Jugé :—Que les allégés contenus dans un affidavit pour *Capias*, énumérés dans le rapport, sont suffisants.

422

CARRIERS.—Liability of Steamboat owners.

Held :—1. That where a steam-boat, running between Quebec and Montreal as a tow-boat, takes the place of a passenger boat, her owner assumes the duties and liabilities of a common carrier with respect to the baggage of the passengers.

2. That where a passenger on board such boat leaves luggage on the deck, outside of the cabin door, and is told by an *employé* on board the boat, that it is safe in such place, the owner of the steamboat, in the event of the luggage being taken away and lost, is liable for the value thereof.

Jugé :—1. Que lorsqu'un vapeur faisant le service de la remorque entre Québec et Montréal, prend la place d'un bateau pour le transport de passagers, le propriétaire de tel vapeur prend sur lui les devoirs et la responsabilité d'un commissionnaire ordinaire par rapport aux effets des passagers.

2. Que dans le cas où un passager sur tel vapeur laisse ses effets sur le pont, en dehors de la porte de la chambre, sur ce qui lui est dit par un employé à bord que ses effets sont en sûreté dans tel endroit, le propriétaire du vaisseau devient responsable pour la valeur d'iceux, dans le cas où ils sont emportés et perdus.

Bankier vs. Wilson.

203

CHURCHES, BUILDING OF.

Held :—That the Commissioners appointed under the Ord : 2 Vict. c. 29, and the subsequent Statutes on the same subject, in what respects the building of churches, parsonage houses, &c., are a special tribunal exercising judicial authority within certain limits.

2. That an *acte de répartition* duly homologated by such Commissioners, is *prima facie* evidence of its contents, at least until the contrary is established and proved.

3. That the right of appeal in suits for the recovery of amounts levied for defraying the expenses of building has been allowed and exercised.

Renière and Millette.

Jugé :—1. Que les Commissaires nommés en vertu de l'Ord : de la 2^e Vict. c. 29, et des Statuts subséquents sur la même matière, en ce qui concerne la construction d'églises, presbytères &c., forment un tribunal spécial, exerçant dans certaines limites l'autorité judiciaire.

2. Qu'un acte de répartition également homologué par ces Commissaires fait preuve par lui-même de son contenu, du moins tant que le contraire n'est pas établi.

3. Que le droit d'appel a été reconnu et exercé sur poursuites en recouvrement de la répartition imposée pour subvenir aux frais de construction.

87

COMMISSION—*Vide* SHIP BUILDING.

CONFESSION OF JUDGMENT.

Held :—That a confession of Judgment to which the Defendant has

Jugé :—Qu'une confession de jugement à laquelle le Défendeur a

set his cross, countersigned by his attorney *ad litem*, is invalid and insufficient; that the Defendant must attach his signature to the confession, and if unable to sign, the confession must be made by means of a notarial instrument.

apposé sa marque d'une croix, même quand elle est contresignée par son procureur *ad litem*, n'est ni valable ni suffisante; mais que le Défendeur y doit apposer sa signature, et que s'il ne peut signer, la confession doit se faire par un acte authentique devant notaires.

McKenzie vs. Jobin.

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CONSIGNEE—*Vide DELIVERY TO CONSIGNEE.*

CONTRAINTE PAR CORPS—*Vide CAPIAS.*

CONVICTION.—*Validity of conviction by Magistrate.*

1o. The service of a copy of a summons issued by a Magistrate, certified by the Clerk of the Peace, followed by the appearance of the Defendant, is sufficient.

2o. A complaint may be made, and summons issued for two offences, provided the object be not to arrest the Defendant in the first instance.

3o. A conviction for one of such offences specifying it, is good.

4o. It is not necessary in a complaint for breach of a By-law, to insert the By-law itself, or make a distinct allegation that it is in force.

5o. A case may be returned before one Magistrate and adjourned from day to day by one or more; it is sufficient if the trial and conviction take place before one and the same,—but :

6o. A conviction for two offences inflicting only one penalty, is bad.

1o. La signification de la sommation d'un Juge de Paix, certifiée par le Greffier de la Paix, suivie d'une comparution par le Défendeur, est suffisante.

2o. Il peut être porté plainte pour deux offenses, et sommation émanée sur icelle, pourvu que l'objet ne soit pas d'arrêter le Défendeur d'abord.

3o. Une conviction pour l'une de ces offenses indiquant laquelle, est bonne.

4o. Il n'est pas nécessaire dans une plainte pour l'infraction d'un règlement, d'y insérer tel règlement, ni d'alléguer spécifiquement que tel règlement est en force.

5o. Une cause peut être rapportée devant un Juge de Paix et ajournée de jour en jour par un ou plusieurs autres Juges de Paix; il est seulement nécessaire que le procès et la conviction aient lieu devant le même,—mais :

6o. Une conviction pour deux offenses qui n'inflige qu'une pénalité, est vicieuse.

Carignan and Montreal Harbour Commissioners.

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COPARTNERS, LIABILITY OF EFFECTS OF.

Held:—That the effects of Co-partners sold under execution, are not liable to the creditors of one of the Cepartners individually, until after payment of the partnership creditors.

Moody vs. Vincent.

Jugé:—Que les effets de Sociétaires, vendus par autorité de justice, ne sont pas sujets au réclamations des créanciers de l'un des associés, avant que les créanciers de la société n'aient été payés.

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COSTS—*Vide ELECTION.*

COSTS, PRIVILEGE FOR.

Held:—That a seizing creditor is only entitled to be collocated, by privilege, upon the proceeds of a judicial sale, for the costs of an ordinary action by default settled at the sum of £4 9 0.

Denis vs. St. Hilaire.

386

Jugé:—Qu'un créancier saisissant n'a droit d'être colloqué, par privilége, sur le produit d'une vente judiciaire, que pour les frais d'une action ordinaire, jugée par défaut, taxés à £4 9 0.

COSTS.—*How levied in Incidental Proceedings.*

Held:—That a Plaintiff has no right to demand an attachment for contempt against a Defendant who has been condemned to pay costs upon an incidental proceeding; but that such Plaintiff is entitled to demand an execution during the pendency of the case.

Ferguson vs. Gilmour.

42.

Jugé:—Qu'un Demandeur n'a pas le droit de demander une contrainte pour mépris de cour, contre un Défendeur qui a été condamné à payer des frais sur des procédures incidentes; mais que tel Demandeur a droit de demander une exécution durant la litiépendance du procé.

CURRENCY.—*Coin of the United States.*

Held:—That no silver coin of the United-States of America, is legal current money in the Province of Canada.

Sauvette vs. Scott.

337

Jugé:—Qu'aucun argent monnayé des Etats-Unis d'Amérique, n'a cours légal dans la Province du Canada.

CUSTOMS.

Held:—That upon importation of goods from a foreign country into Canada, duty may be charged on such goods, either on their value at the time of the purchase of the same, or upon their value at the time of export, on the contingency of a rise in the interval.

Moffatt and Bouthillter.

235 and 305

Jugé:—Que sur l'importation de marchandises de pays étrangers en cette Province, les droits imposés sur icelles peuvent être chargés sur la valeur de telles marchandises à l'époque de leur achat, ou sur leur valeur à l'époque de leur exportation, dans le cas d'une augmentation de valeur dans l'intervalle.

DAMAGES, BREACH OF CONTRACT.

Held:—That in the case of the non execution of a contract of lease, the lessee can only recover such damages as are the immediate result of such non execution, and not the consequential damages which the parties could not have

Jugé:—Que dans le cas d'inexécution d'un contrat de louage ou autre, le preneur n'a droit de recevoir que les dommages qui résultent directement de telle inexécution, et non ceux qui n'en ressortent pas naturellement, et que les parties

foreseen; that the Plaintiff cannot recover, as damages, what he might have made in consequence of an unforeseen event, by subletting the building for a purpose foreign to its legitimate use; that the Plaintiff having leased a theatre cannot claim in the shape of damages what he might have received from the Government for giving up his lease, the legislative buildings having since such lease been destroyed by fire, and the theatre being the only building fit for the sittings of the Legislature.

Lee vs. Music Hall Association.

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n'ont pu prévoir; que le preneur ne peut réclamer, comme dommages, ce qu'il aurait pu gagner, par suite d'un événement imprévu, en sous-louant l'édifice pour un objet autre que sa destination ordinaire; que le Demandeur, ayant loué un théâtre, ne peut réclamer sous forme de dommages ce qu'il aurait pu recevoir du Gouvernement pour renoncer à son bail, les chambres législatives ayant été depuis détruites par un incendie, et le théâtre étant le seul local convenable pour les séances de la Législature.

DELIVERY TO CONSIGNEE.

Held:—That the placing of goods on board of a schooner by a debtor, addressed to his creditor, without a previous sale or agreement to that effect, does not transfer the property nor the possession to the consignee, and such goods may be legally seized as the property of the consignor, notwithstanding the bill of lading signed by the master of such schooner, if such seizure take place before the goods reach the hands of the consignee.

Fréchette vs. Corbet.

211

DELIVERY OF GOODS AT THE CUSTOMS.

The Respondent, as master of a Vessel, had brought from Liverpool, a quantity of galvanized metal deliverable at the Port of Quebec, to "order or assigns," and no consignee being found, the Respondent sent, among others, to the Appellant, to ascertain if he was the importer, the latter answered that he expected a quantity of metal, but not having received any advice of its arrival, he would not take it. The Statute regulating the Customs requires, that importers should, within five days after the arrival of the Vessel, land the goods and pay the duties thereon, and that in default thereof, it shall be lawful for the Officers of Customs to con-

Jugé:—Que la remise d'effets à bord d'une goëlette par un débiteur, en consignation à son créancier, sans une vente ou convention préalable à cet effet, n'en transfère pas de suite la propriété ni la possession à tel créancier, et qu'ils peuvent être saisis légalement comme appartenant au consignateur, nonobstant le connaissement qu'en a signé le maître de la goëlette, si la saisie a lieu avant qu'ils soient parvenus au consignataire.

L'Intimé, maître d'un Navire, avait apporté de Liverpool, une quantité de métal galvanisé qui devait être livrée dans le Port de Québec, "à ordre," et le consignataire n'ayant pu être trouvé, l'Intimé fit des perquisitions pour le découvrir, et, entre autres, fit demander à l'Appellant s'il en était l'importateur, auquel celui-ci répondit qu'il attendait de tels effets mais qu'il ne les prendrait pas, vu qu'il n'avait reçu aucun avis de leur arrivée. Le Statut qui règle les droits de Douane exige, que tout importateur devra, dans les cinq jours qui suivront l'arrivée d'un Navire, faire mettre à terre ses effets et payer les impôts sur iceux, et qu'à défaut de

vey such goods to the Customs' warehouse. The metal was kept on board for 12 days after arrival, and by authority of the Collector of Customs, conveyed in an order to the Officer of that Department on board, directing him to land the metal and convey it to the Customs' warehouse, the metal was landed on the wharf, where it lay for some days exposed to the rain and weather, by the action of which it was damaged; and the Appellant having sued for these damages it was —

Held :—That the Respondent had fully complied with the terms and conditions of the Bill of Lading, that there was no negligence or carelessness on his part, and that he was not responsible for these damages.

Scott and Hescroft.

ce faire, il sera loisible aux Officiers de Douane de transporter telles marchandises au magasin des Douanes. Les marchandises furent gardées à bord pendant douze jours après l'arrivée du Navire, et après ce délai, par ordre du Collecteur à l'Officier de Douane à bord, lui commandant de faire mettre à terre ces marchandises, et les transporter au magasin des Douanes, elles furent déchargeées sur le quai, où elles restèrent pendant quelques jours exposées au mauvais temps, et furent endommagées, et l'Appelant ayant institué une action en dommages il fut —

Jugé :—Que l'Intimé s'était entièrement conformé aux termes et conditions du Connaissement, qu'il n'y avait aucune négligence ou manque de soins de sa part, et qu'il n'était pas responsable de ces dommages.

274

DONATION.—*Vide Registration.*

DONATION.—*Liability of Donee to pay debts of Donor.*

Held :—That a donee, bound to pay the debts of the donor, may be condemned to pay the amount of a judgment rendered against the vacant estate of the donor, posterior in date to the passing of the donation, upon the mere production of such judgment, and without it being necessary to prove that the debt existed prior to the passing of the donation, otherwise than by what is stated in such judgment. *Contra* :—MEREDITH, Justice, is of opinion that the debt for which the judgment has been rendered, having no date certain, and there being no proof of its existence, prior to the passing of the donation, the donor is not liable, and the action ought to be dismissed.

Aylwin vs. Allopp.

Jugé :—Qu'un donataire, obligé de payer les dettes du donneur, peut être condamné à payer le montant d'un jugement rendu contre la succession vacante du donneur, postérieurement à la passation de la donation, sur la simple production de tel jugement, et sans qu'il soit nécessaire de prouver que la dette existait avant la passation de la donation, autrement que par l'énoncé du jugement. *Contra* :—MEREDITH, Juge, est d'opinion que la dette qui est l'objet du jugement, n'ayant pas une date certaine, et ne paraissant pas avoir eu son existence avant la donation, le donataire n'en est pas tenu, et que l'action doit être déboutée.

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DONATION.—*Delivery of Moveable Effects.*

Held :—That a donation of moveables made by a contract of marriage does not require an actual delivery.

While vs. Atkins.

Jugé :—Qu'une donation de meubles contenue dans un contrat de mariage ne requiert point tradition.

420

ELECTION, CONTESTATION OF.—*Costs.*

The Defendants presented petitions to the House of Assembly against the Election and Return of one of its Members, which were referred to the usual select committee. The Defendants subsequently applied for a commission to examine witnesses, &c., and the committee, under the statute, appointed the Plaintiff (who is a Circuit Judge for Lower Canada,) Commissioner. The Plaintiff performed the duties incumbent on him to fulfil. Before the committee had made their final report, the House was dissolved by proclamation of the Governor General, and the committee thereby for ever precluded from making a final Report. The statute enacts that the Commissioner shall, immediately after the select committee shall have made their final report to the House on the merits of the petition, be entitled to demand and receive, from the parties upon whose application to the select committee such Commissioner shall have been appointed, fifty shillings for every day on which such Commissioner shall have been engaged on such commission, and his travelling expenses.

Held:—In a suit by the Plaintiff to recover from the Defendants the sums allowed by statute, that the Plaintiff had no right of action, either under the statute or at common law.

Power vs. Bezeau.

Les Défendeurs présentèrent des requêtes à la Chambre d'Assemblée contre l'Election de l'un de ses Membres, lesquelles furent référées au comité spécial en pareils cas. Les Défendeurs subséquemment demandèrent une commission pour l'examen de témoins, etc., et le comité, en vertu du statut, nomma le Demandeur (qui est Juge de Circuit pour le Bas-Canada) Commissaire. Le Demandeur remplit les devoirs que lui imposait cette charge. Avant que le comité eut fait son rapport final, la Chambre fut disoute par proclamation du Gouverneur Général, et le comité par cela empêché de ne jamais faire aucun rapport final. Il est pourvu par le statut que le Commissaire, immédiatement après que le comité spécial aura fait son rapport final à la Chambre sur les mérites de la requête, aura droit de demander et recevoir, des parties à la demande desquelles le comité spécial aura nommé tel Commissaire, cinquante chelins pour chaque jour qu'il aura été employé dans l'exécution de sa charge, et ses frais de voyage.

Jugé:—Dans une action par le Demandeur contre les Défendeurs, pour recouvrer le montant accordé par le statut, que le Demandeur n'avait aucun droit d'action, soit en vertu du statut soit en vertu du droit commun.

253

ERASURES.—*Solidarité.*

Held:—1o. That words struck out and marginal notes in a return or certificate of seizure, not noticed therein, do not always make such return void, and the court, according to circumstances, may maintain its validity.

2o. That in the case submitted, upon an action *en garantie d'évi-*

Jugé:—1o. Que les ratures et renvois dans un certificat de signification, non mentionnés, ne vident pas toujours le rapport, et que la cour, suivant les circonstances, peut maintenir tel rapport.

2o. Que dans l'espèce, sur demande en garantie d'éviction contre

tion against joint sureties, the judgment must express that the Defendants are jointly and severally condemned to guaranty the Plaintiff.

des cautions solidaires, le jugement doit exprimer la solidarité entre les cautions condamnées à indemniser le Demandeur.

Demers and Parant,

36

EVIDENCE—*Vide SLANDER, PROOF OF.*

FOREIGN JUDGMENT.

Held:—That a plea by which it is alleged that a suit has already been brought and decided in a competent foreign tribunal, by the same Plaintiff against the same Defendant, for the same causes of action, is a good plea, more especially if it sets up payment of the judgment by the Defendant.

Vaughan vs. Campbell.

431

Jugé:—Qu'une défense par laquelle il est allégué qu'une action a déjà été intentée devant un tribunal étranger, par le même Demandeur contre le même Défendeur, pour les mêmes causes d'action, est un bon plaidoyer, et particulièrement si la défense allégué paiement du jugement.

GUARDIAN TO SEIZURE, CLAIM OF.

The Plaintiff became the guardian of a vessel seized on the stocks under a Writ of *Saisie-Revendication* addressed to the Sheriff, issued at the instance of the Defendant. Sometime afterwards, the vessel was launched by the parties in whose possession the vessel was at the time of the seizure, without any authority. She lay in port for fifteen months, and thereby suffered considerable damage. She moreover always remained, *de facto*, in the possession of the last named parties, and the disbursements incurred for the keeping and custody of the vessel were made, not by the Plaintiff, but by a brother of one of the parties who held possession of the vessel.

Held:—That in an action by the Plaintiff to recover these disbursements, he had, under the circumstances, no claim against the Defendant at whose instance the seizure had been made.

Dinning vs. Jeffery.

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Le Demandeur devint le gardien d'un vaisseau saisi sur ses chantiers en vertu d'un Writ de Saisie-Revendication adressé au Shérif, émané à la poursuite du Défendeur. Quelque temps après le vaisseau fut lancé par les parties en la possession desquelles il était lors de la saisie, sans aucune autorité. Le vaisseau resta dans le port pendant quinze mois, et souffrit en conséquence des dommages considérables. De plus le vaisseau resta toujours, en effet, en la possession des mêmes parties, et les déboursés encourus pour la garde du vaisseau furent faits, non par le Demandeur, mais par le frère de l'une des parties qui en était en possession.

Jugé:—Que dans une action par le Demandeur pour recouvrer ces déboursés, il n'avait, dans les circonstances, aucun droit de réclamer contre le Défendeur à la poursuite duquel le vaisseau avait été saisi.

HABEAS CORPUS—

Vide IMPRISONMENT OF RETURNING OFFICER.

IMPRISONMENT OF RETURNING OFFICER, BY THE LEGISLATIVE ASSEMBLY.

Held :—**1o.** That by the Statutes 12 Vic., c. 27, and 14 and 15 Vic., c. 1, Returning Officers, and their Deputies, have been and are subject to punishment by the House of Assembly for malversation ; that malversation on their part is a special breach of privilege of the House, as an attempt to put in or keep out a member unjustly ; and that the general power accorded in cases, not specially provided for in the Statutes, must almost always relate to the Returning Officer, or his Deputy, or to some person, not a member, in respect of whom the House is authorized to make such orders, as to the House may seem proper, necessarily implying a power in the House to enforce such order.

2o. That the House of Assembly has the power, as a power necessary for its existence, and the proper exercise of its functions, of determining judicially, all matters touching the election of its own members, including therein the performance of the duty of those officers, who are entrusted with the regulation of the election of its members.

3o. That Courts of law cannot inquire into the cause of commitment by either House of Parliament, nor discharge, nor bail a person, who is in execution by the judgment of any other tribunal ; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust and contrary to every principle of positive law or national justice, the Court will not only be competent, but bound to discharge the party.

4o. That a commitment, by either House of Parliament, may be examined upon a return to a writ of Habeas Corpus.

Jugé :—**1o.** Que par les Statuts 12 Vict., c. 27, et 14 et 15 Vict., c. 1, les Officiers Rapporteurs, et leurs Députés, ont été et sont sujets à être punis par la Chambre d'Assemblée pour malversation ; que la malversation de leur part est une violation spéciale des priviléges de la Chambre, comme tentative d'introduire injustement un membre ou de l'en faire rejeter ; et que le pouvoir général accordé dans ces cas, pour lesquels il n'y a aucune provision spéciale par un Statut, doit presque toujours avoir rapport à l'Officier Rapporteur, ou à son Député, ou à quelqu'un qui n'est pas membre, relativement à qui la Chambre est autorisée à faire tels ordres qu'elle jugera à propos, et que ce pouvoir donne nécessairement à la Chambre le pouvoir de mettre tels ordres à exécution.

2o. Que la Chambre d'Assemblée possède, comme étant nécessaire à son existence et à l'exercice de ses fonctions, le pouvoir de déterminer judiciairement toute matière touchant à l'élection de ses propres membres, compris la manière dont les officiers qui sont chargés de la conduite des élections de ces membres, remplissent leurs devoirs.

3o. Que les Cours de justice ne peuvent s'enquérir de la cause de détention par l'une ou l'autre Chambre, ni décharger, ni admettre à caution une partie qui subit la sentence d'un autre tribunal ; néanmoins si le mandat ne constate pas que l'offense ait été un mépris, (*contempt*) mais au contraire est évidemment arbitraire, injuste et opposé à tout principe de droit établi ou de justice, non seulement la Cour serait compétente, mais il serait de son devoir de décharger la partie.

4o. Qu'un mandat d'arrêt, par l'une ou l'autre Chambre, peut être examiné sur un retour à un Writ d'Habeas Corpus.

5o. That the Justices here, as well as in England, possess, and have exercised the power to issue writs of Habeas Corpus in matters of commitment by either House of Parliament.

6o. That the Provincial Statutes 12 Vict., cap. 27, and 14 and 15 Vict., cap. 1, invest the House of Assembly with power to punish, by imprisonment, a Deputy Returning Officer for malfeasance or breach of privilege.

Lavoie.—Ex parte.

5o. Que les Juges dans ce pays, comme en Angleterre, possèdent, et ont exercé le pouvoir d'émaner des writs d'Habeas Corpus en matière de détention par l'une ou l'autre Chambre du Parlement.

6o. Que les Statuts Provinciaux 12 Vic., c. 27, et 14 et 15 Vic., cap. 1, donnent pouvoir à la Chambre d'Assemblée de punir, par emprisonnement, un Député Officier Rapporteur pour malversation comme violation de privilége.

99

INSCRIPTION DE FAUX.

Held:—That an *Inscription en Faux* cannot be maintained against a notarial copy containing a slight alteration or erasure, as in the case submitted, altering the word “*parties*” so as to make it “*party*”.

Halpin and Ryan.

Jugé:—Qu'une Inscription en Faux ne peut être maintenue à raison d'une surcharge sans importance, dans l'acte argué de faux, comme, dans l'espèce, la transformation de “*parties*,” en “*party*” au moyen de nature et surcharge.

430

INSURANCE.

Held:—1o. That the interest of the vendor of real property, in a Policy of Insurance against fire, effected by the vendor previous to the sale, passes by operation of law to the purchaser, the sale being notified to the Company.

2o. That a payment made by the Insurance Company to the vendor, on a loss occurring after the sale, of a sum greater than the balance of the purchase money remaining unpaid, enures to the benefit of the purchaser as a discharge from such balance.

Leclair vs. Crapeer.

Jugé:—1o. Que l'intérêt du vendeur d'un immeuble, dans une Police d'Assurance contre le feu effectuée par le vendeur avant la vente, est transporté de plein droit à l'acquéreur par la signification de la vente à la Compagnie.

2o. Que le paiement fait par la Compagnie d'Assurance au vendeur, sur une perte faite après la vente, d'une somme excédant la balance du prix d'achat restant due, profite à l'acquéreur, comme paiement de la balance.

487

INVENTORY—*Vide Tutorship.*

JURY TRIAL.—*Insurance case.*

Held:—That a suit for the recovery of the amount of a Policy of Insurance, against fire, may be tried by a Jury.

McGillivray vs. The Montreal Insurance Company.

Jugé:—Qu'une poursuite pour le recouvrement du montant d'une Police d'Assurance, contre le feu, peut être soumise à un Jury.

406

LEASE FOR NUMBER OF YEARS, EFFECT OF.

Held:—1o. That the lessee of a lot and water power near the Lachine Canal, and within the limits of the City of Montreal, from the Commissioners of Public Works under a lease for twenty one years, renewable for ever on the terms mentioned in the lease, has a *jus in re*, and is liable for City taxes and assessments, as proprietor of the leased property.

2o. That such lease is an alienation of the *domaine utile*, the Crown having only the *domaine direct*, and if made previous to the 14th and 15th Vict., cap. 128, is not affected by the powers conferred upon the Corporation of the City by the 92nd Section of that Act.

Harvey.—Ex parte.

378

LEGACY—*Vide WILL.*

LESSOR AND LESSEE.

Held:—That a lessee of land cannot set up, as against his lessor, Plaintiff in a pietory action, ameliorations made by the lessee on the land sought to be recovered.

Peltier vs. Larichelière.

96

LIABILITY OF BUILDERS.

Held:—That the builder is responsible for the *vices du sol*, although he be bound by his contract to follow certain plans and specifications under the direction of an architect employed by the proprietor.

Brown and Laurie.

65

LIEN.

Held:—That effects upon which a Defendant has a lien will not be delivered up out of his possession, in an action of revendication, unless the amount of his claim be deposited in Court, in lieu of the effects.

Bell vs. Wilson.

491

Jugé:—1o. Que le preneur à bail d'un emplacement et pouvoir d'eau, près le Canal Lachine, dans les limites de la Cité de Montréal, par bail des Commissaires des Travaux Publics, pour vingt et un ans, avec faculté de le renouveler à perpetuité aux conditions mentionnées dans le bail, acquiert un *jus in re*, et devient responsable, comme propriétaire du fonds baillé, des taxes et cotisations imposées par la Cité.

2o. Que tel bail emporte alienation du domaine utile, la Couronne ne retenant que le domaine direct, et que si il est fait avant la passation de l'Acte de la 14e et 15e Vict. chap. 128, ce bail n'est pas affecté par les pouvoirs conférés à la Corporation de la Cité par la 92e Section de cet Acte.

LEGACY—*Vide WILL.*

LESSOR AND LESSEE.

Jugé:—Que le locataire d'une terre ne peut, à l'encontre d'une action pétitoire portée contre lui par le locateur, plaider qu'il a fait des améliorations sur la terre réclamée par le Demandeur.

Jugé:—Que le constructeur est responsable des vices du sol, nonobstant qu'il se soit engagé à suivre certains plans et devis sous la direction d'un architecte employé par le propriétaire.

Jugé:—Que des effets sur lesquels un Défendeur réclame un gage, ne seront point mis hors de sa possession, dans une action en revendication, à moins que le montant de sa réclamation ne soit déposé en Cour, pour tenir lieu du gage.

LODS ET VENTES.

Held:—1o. That it is lawful, if there are two different means of effecting a purchase of land, to adopt that which is free from, or less productive of, seigniorial dues, provided the contract be serious and made in good faith and without deceit.

2o. That in the case submitted, there was deceit inasmuch as the exchange was said to have been made without any return (*soulte*), whereas it was in evidence that a *soulte* of 11,000 francs was stipulated; that the exchange being thus mixed with sale, *lods et ventes* had accrued and were due on the said *soulte*,

Rolland and Lareau.

MARRIED WOMEN,—*Security by.*

Held:—That the express authorization of the husband to his wife, *séparée de biens*, to become bound as his surety, is sufficiently proved by a notarial deed signed by them, in the beginning of which the wife appears, with other creditors of her husband, and is declared to be “*autorisée en justice*,” and otherwise “thereby specially authorized by” her husband, testified by his signature thereto”, as party of the *first part*, and also appears, with another, as surety for her husband, and as a party of the *fourth part*, although no words of authorization are contained in that part of the deed where they appear, or where she binds herself as such surety.

Joseph.—Ex parte.

MINOR.

Held:—That a *mineur marchand* can be sued and condemned for debts contracted in the transaction of his business, without its being necessary that a tutor should be appointed to him, such minor being with respect to such transactions reputed of full age.

Denaïs and Côté.

Jugé:—1o. Que de deux voies différentes de faire une acquisition, il est permis de choisir celle qui est exempte, ou moins productive, de droits seigneuraux, pourvu que la convention soit sérieuse et sincère et non simulée.

2o. Que dans l'espèce il y avait simulation, en ce que l'échange était dit avoir été fait sans soulte, tandis qu'il avait été constaté par la preuve qu'il y avait de fait eu soulte de 11,000 francs; que l'échange étant mêlé de vente, il y avait jusqu'à concurrence de la soulte, ouverture aux profits de lods et ventes.

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Jugé:—Que l'autorisation expresse du mari à sa femme, séparée de biens, pour s'engager comme sa caution, est suffisamment prouvée par un acte notarié signé par eux, au commencement duquel la femme comparaisse avec autres créanciers de son mari, est déclarée être “*autorisée en justice et en autre spécialement autorisée*,” au dit acte par son mari partie au dit acte et signataire d'icelui, “comme partie d'une part, avec un autre comme caution de son mari, et comme partie en quatrième lieu, quoique cette partie de l'acte où ils comparaissent, et où la femme s'oblige comme caution de son mari, ne contienne aucune autorisation spéciale.

320

Jugé:—Qu'un mineur marchand peut être poursuivi et condamné pour les dettes contractées par lui pour le fait de son commerce, et sans qu'il soit besoin de lui faire nommer un tuteur, tel mineur étant à l'égard de son commerce réputé majeur.

193

MUNICIPAL DEBENTURES.—BY-LAW IN RELATION THERETO.

Held:—1. That under the 16 Vict., c. 138, a By-law of a County Municipality Corporation which authorizes a subscription for shares of stock on a Railway passing through the county, and for the issuing of Debentures to pay for such shares, is void if no provision is made in the By-law for imposing an annual rate or assessment for the payment of interest, and the establishment of a sinking fund;

2. That in passing a By-law without making such provision, the corporation exceeds its powers and exercises franchises and privileges not conferred on it by law;

3. That under the 12th Vict. c. 41, the Superior Court, on petition in the name of the Attorney General, has jurisdiction over corporations, and to set aside such By-law.

Jugé:—1. Que sous la 16e Vict., c. 138, un Règlement d'un Conseil Municipal de Comté qui autorise le maire ou autre personne à prendre et à souscrire des actions dans le capital d'un Railroute passant à travers tel comté, et à émaner des Débentures pour le paiement de telles actions, est nul si par tel Règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement;

2. Qu'en passant un Règlement sans faire telle provision, la corporation excède ses pouvoirs et exerce une franchise et des priviléges qui ne lui ont pas été conférés par la loi;

3. Que sous la 12e Vict., c. 41, la Cour Supérieure, sur requête au nom du Procureur Général, a juridiction sur les corporations, et peut déclarer nul tel Règlement.

Regina vs. Municipality of Two Mountains.

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MUNICIPALITIES.

Held:—That under the 16 Vict., c. 138, a By-law of a County Municipality Corporation which authorizes a subscription for shares of stock on a Railway passing through the county, and for the issuing of Debentures to pay for such shares, is void if no provision is made in the By-law for imposing an annual rate or assessment for the payment of interest, and the establishment of a sinking fund.

Jugé:—Que sous la 16e Vict., c. 138, un Règlement d'un Conseil Municipal de Comté qui autorise le maire ou autre personne à prendre et à souscrire des actions, dans le capital d'un Railroute passant à travers tel comté, et à émaner des Débentures pour le paiement de telles actions, est nul si par tel Règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement.

Regina vs. Municipality of Shefford.

200

NULLITY OF SETTLEMENT OF ACCOUNT

Vide Tutorship.

OVER BIDDING—*Vide Ratification.*

PEWS IN CHURCHES.

Held:—That the covenant in the lease of a pew in a church, by which covenant it is agreed that in default of payment of the rent to accrue at the period fixed by the lease, such lease will immediately become null and void and of no effect, and that it will be lawful to the lessors, forthwith to take possession of the pew leased, and to proceed to relet the same, without being bound to give any notice thereof to the lessee, is not a covenant which will be regarded as a *clause comminatoire*, but is a covenant the execution of which will be enforced.

Richard and La Fabrique de Québec.

3

PLEADINGS.

1 Held:—1. That in the Circuit Court a Defendant can foreclose a Plaintiff who neglects or refuses to file, within the delay allowed by the Statute, answers to the Defendant's pleas, after demand thereof duly made.

2. That thereupon the Defendant can inscribe the case on the Roll of *Enquêtes*, and, when one of the pleas is a *Défense au fonds en fait*, declare that he has no witnesses to examine, and he can then inscribe the case on the Roll de Droit.

3. That the Plaintiff's action must then be dismissed, there being no proof in support of his demand.

Meade vs. Baille.

58

2. Held:—That an *Exception à la forme* in which it is alleged that the contents of a paper writing, purporting to be a copy of a declaration, are different from the contents of the original declaration, and are *disconnected, absurd and unintelligible*, is sufficient.

Doutre and The Montreal and Bytown Railway Company.

98

Jugé:—Que la clause dans un bail d'un banc dans une église, par laquelle clause il est stipulé qu'à défaut du paiement du loyer aux termes et époques fixées, dès lors et à l'expiration des dits termes le dit bail sera et demeurera nul et résolu de plein droit, et que le bailleur rentrera en possession du dit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans être tenu de donner aucun avis ou assignation au preneur, n'est pas une clause qui doit être réputée comminatoire, mais qui doit avoir son effet.

1 Jugé:—1. Que dans la Cour de Circuit un Défendeur peut forclore le Demandeur qui néglige ou refuse de filer ses réponses aux plaidoyers du Défendeur, dans le délai voulu par la loi, après que ces réponses ont été demandées.

2. Qu'alors le Défendeur peut inscrire la cause sur le Rôle des Enquêtes, et, lorsqu'une Défense au fonds en fait a été filée, déclarer qu'il n'entend pas examiner de témoins, et il peut ensuite l'inscrire sur le Rôle de Droit.

3. Que l'action du Demandeur sera alors déboutée, faute de preuve au soutien de la demande.

2. Jugé:—Q'une Exception à la forme dans laquelle il est allégué que le contenu d'un écrit, dit être copie d'une déclaration, est différent du contenu de la déclaration originale, n'est pas connexe, est absurde et inintelligible, est suffisante.

3 Held :—That in an action by a Railway Company, against a Stockholder for calls, it is sufficient for such Company to state in the caption of the declaration that it is a body politic and corporate, without a specific allegation to that effect.

The mode of raising an objection, as to the sufficiency of allegation of the corporate capacity of a Company, is by an *exception à la forme*, and not by a *défense au fonds en droit*.

The Saint Lawrence and Ottawa Grand Junction Railroad Company and Frothingham. 140

4. Held :—That where the delay of twenty five days, allowed by law for the service of the copy of a petition and notice of appeal from the Circuit Court, expires on a legal holiday, the service thereof may be made on the day following.

That it is no valid objection, that service of a copy of the petition and notice of appeal has not been made upon the Clerk of the Circuit Court, and that in consequence of such omission an appeal cannot be dismissed, nor that the copy of the petition and notice of appeal served upon the Attorney of the Respondent, bears date previously to the rendering of the judgment appealed from.

Dean and Jackson.

5 Held :—That notice of motion received by one of two Attorneys, after the elevation of a previous partner to the Bench is sufficient.

Dubois and Dubois.

6 Held :—That an action of damages, against several Defendants charged with breach of contract to convey a raft, cannot be dismissed on a *défense au fonds en droit*, although by the conclusions it is prayed that the Defendants be condemned jointly and severally.

Ranger and Chevalier et al.

3 Jugé :—Que dans une action par une Compagnie de chemin de fer, contre un Actionnaire pour versements, il est suffisant que telle Compagnie dans l'intitulé de la déclaration allégué son existence comme corps politique et incorporé, sans qu'il soit besoin d'un allégué spécial à cet effet.

Le mode de soulever une objection, quant à la suffisance de l'allégué que la Compagnie est corps incorporé, est par exception à la forme, et non par une défense au fonds en droit.

The Saint Lawrence and Ottawa Grand Junction Railroad Company and Frothingham. 140

4. Jugé :—Que lorsque le délai de vingt-cinq jours, accordé par la loi pour la signification de copie d'une requête et d'un avis d'appel de la Cour de Circuit, expire un jour de fête, telle signification peut être faite le jour suivant.

Que le défaut de service de copie de la requête et de l'avis d'appel sur le Greffier de la Cour de Circuit, n'est pas une cause suffisante pour faire renvoyer l'appel, et que quoique la copie de la requête en appel et de l'avis d'icelle servie sur le Procureur de l'Intimé, soient datées avant la reddition du jugement dont est appel, néanmoins ce n'est pas nonplus une cause suffisante pour faire renvoyer l'appel.

164

5 Jugé :—Qu'avis de motion donné à l'un de deux Procureurs associés, l'autre ayant été promu au Banc est suffisant.

167

6 Jugé :—Qu'une action en dommages, contre plusieurs Défendeurs, par laquelle il est allégué qu'ils ont fait défaut de remplir un marché pour le transport d'une cage, ne peut être renvoyée sur une défense en droit, quoique par les conclusions il soit demandé que les Défendeurs soient condamnés solidairement.

180

Security for costs.

7 Held :—That the delay for filing an *exception à la forme*, when security for costs is demanded, will run from the day when such security is given.

7 Jugé :—Que le délai pour filer une exception à la forme, quand il est fait une demande de cautionnement pour les dépens, ne court que du jour où tel cautionnement est donné.

Smith vs. Merrill.

199

Security for Costs.

8 Held :—That where a Defendant files an *exception à la forme*, in a case where a rule has been made absolute staying all proceedings until the Plaintiff shall have put in security for costs, the Plaintiff is not entitled to a hearing upon the merits of such exception, till he shall have put in security for costs.

Jugé :—Que dans le cas de l'enfilure d'une *exception à la forme*, dans une cause où il a été ordonné une suspension de procédure jusqu'à ce que le Demandeur ait donné caution pour les frais, il ne sera pas permis à tel Demandeur d'être entendu sur les mérites de l'*exception à la forme*, avant que le cautionnement ordonné ait été fourni.

Easton vs. Benson.

352.

Proceedings against Sheriff in case of mainlevée.

9. Held :—That a party whose property has been attached by *saisie revendication*, and who has obtained *main-levee* of the same, may proceed against the Sheriff for the recovery of the said goods, as well by rule of Court in the cause, as by action against the Sheriff to obtain the said property, or the value thereof, together with such damages as may have been suffered by reason of the non delivery of the same.

9. Jugé :—Qu'une partie dont les effets ont été saisis par le Shérif, par voie de saisie revendication, et qui en a obtenu main-levee, peut procéder contre le Shérif pour en obtenir le recouvrement, non seulement par règle dans la cause même dans laquelle la saisie a eu lieu, mais aussi par action directe contre le Shérif pour obtenir ces effets, ou leur valeur, et de plus les dommages qui lui sont résultés par le défaut de livraison de ces effets.

Irwin and Boston.

397

10 Held :—That the allegation of having suffered damages, in consequence of the protest of a bill, is sufficient to sustain the Plaintiff's declaration on demurrer.

10 Jugé :—Que l'allégué que le Demandeur a souffert des dommages, en conséquence du protêt d'une lettre d'échange, est suffisant pour faire renvoyer une défense en droit à la déclaration du Demandeur.

Henry vs. Mitchell.

489

PRINCIPAL AND AGENT.—Signing of Notes.

1. Held :—That an agent has no authority to bind his principal by signing and discounting a promis-

Jugé :—1o. Qu'un agent ne peut obliger son principal, en signant et escomptant, comme tel agent, un

sory note as agent, although authorized, by written power of attorney, to manage, administer, sell, exchange and concede the real and personal estate of the principal, and to collect, compound and arbitrate all claims and debts, with a general clause empowering him "to do all acts, matters and things, whatsoever, in and about the property, estate and affairs of the principal as amply and effectually, to all intents and purposes, as the principal could have done in her own person if the said power of attorney had not been made."

2. That an agent with the powers above mentioned is an *administrator omnium bonorum*, with no power to borrow, except for purposes within the limits of his administration.

3. That the declarations of the agent to an accommodation endorser, to obtain his endorsement, are not evidence in a suit against the principal by the party who afterwards discounted the note.

billet promissoire, quoique autorisé par procuration écrite, à gérer, administrer, vendre, échanger et céder les biens meubles et immeubles de son principal, et de recouvrer toutes dettes et réclamations, et de faire tous compromis et arbitrages, avec clause générale l'autorisant "à faire tous actes, "matières ou choses quelconques, "relativement aux propriétés, biens "et affaires du principal, aussi amplemment et effectivement, à toutes "fins quelconques, que l'aurait pu "faire le principal lui-même, si "la dite procuration n'eût pas été "exécutée."

2o. Qu'un mandataire revêtu des pouvoirs ci-dessus mentionnés est un *administrator omnium bonorum*, qui ne peut faire d'emprunt, si ce n'est pour des objets relatifs à son administration.

3o. Que les déclarations du mandataire à un endosseur pour accommodation, afin d'obtenir son endossement, ne peuvent être produites en témoignage contre le principal, par la personne qui a subsequemment escompté le billet.

Castle vs. Baby.

411

PRESCRIPTION—*Vide Railway Companies, Liability of.*

PRIVILEGE—*Vide Costs.*

PROMISSORY NOTE—*Vide Principal and Agent.*

PROMISSORY NOTE.

Held:—That in the case of a protest of a note dated at Montreal and payable at a bank in Albany, in the State of New York, a notice of protest mailed at Albany addressed to an endorser at Montreal, (protest being made and notice mailed according to the laws of the State) is not sufficient, the postal arrangements between the two countries at the time, being such, that letters could not pass through the post without prepayment of postage from Albany to the line.

Jugé:—Que dans l'espèce d'un billet daté à Montréal et payable à Albany, dans l'Etat de New-York, l'avis de protêt envoyé par la malle et adressé à l'endosseur à Montréal, (le protêt étant fait et l'avis mis à la poste suivant les lois de l'Etat) n'est pas suffisant, les arrangements entre les deux pays relativement aux malles ne permettant pas le passage de lettres sans paiement préalable d'Albany à la ligne entre les deux pays.

Notice sent to the endorser at the place where the note was dated is sufficient diligence; such place being sufficient indication of the endorser's domicile to warrant the holder in sending notice there, the endorsement being unrestricted.

L'avis adressé à l'endosseur au lieu où le billet est daté est une diligence suffisante; telle indication justifiant le porteur, lorsque l'endorsement est sans restriction, de regarder ce lieu comme le domicile de l'endosseur.

Howard and Sabourin.

45

RAILWAY COMPANIES, LIABILITY OF.

Prescription.

Held:—That the provisions of the 8th Vict. Ch. 25, Sec. 49, and 14th and 15th Vict., Ch. 51, Sec. 20, as to the institution of actions against Railway Companies, and others, within the period of six months, do not apply to actions for damages arising from neglect and carelessness of the Company's servants in the ordinary management of the Railroad.

Jugé:—Que les dispositions de la 8me Vict. Ch. 25, Sec. 49 et les 14me et 15 Vict. Ch. 51, Sec. 20, quant à l'institution d'actions contre les Compagnies de Chemins de Fer, et autres, dans l'espace de six mois, ne s'appliquent pas aux actions pour dommages résultant de la négligence ou manque de précaution des employés de la Compagnie.

Marshall vs. Grand Trunk Railway.

339

RATIFICATION.—Ventilation, Overbidding.

1 Held:—1o. That the parties interested in the contestation or issue joined, are alone to be made parties to an appeal.

2o. That in a demand for ratification of a deed of sale of several lots of ground, (affected with distinct charges and mortgages) for one price, the hypothecary creditors cannot be foreclosed from overbidding until the price of each lot has been determined by a *ventilation*, and that the Petitioner cannot obtain the ratification of his title until such *ventilation* has taken place.

3o. This *ventilation* must be homologated by the Court before the monies deposited can be distributed.

1 Jugé:—1o. Que sur un appel il n'est besoin d'assigner que les parties intéressées dans la contestation soulevée.

2o. Que dans le cas d'une demande en ratification d'un acte de vente de plusieurs lots, (affectés à des charges et hypothèques distinctes) pour un seul prix, les créanciers hypothécaires ne peuvent être forcés de surenchérir qu'après que le prix de chaque lot a été établi par ventilation, et qu'avant telle ventilation, le Requérant ne peut obtenir ratification de son titre.

3o. La ventilation doit être homologuée avant que la distribution des deniers déposés puisse être faite.

Dewitt and Burroughs.

70

Overbidding, Liability of Vendor and Vendee.

2 Held:—1o. That the vendor who covenants that the purchaser shall obtain a ratification of title before making payment, becomes, by reason of such covenant, a party to the proceeding for ratification, and that, consequently, the purchaser is not

2 Jugé:—1o. Que le vendeur qui stipule que l'acquéreur prendra ratification de titre avant de payer, est, par le fait de cette stipulation, partie à la procédure en ratification, et que, partant, l'acquéreur n'est pas tenu de l'appeler en garantie

bound to call in the vendor en *garantie*, to give him an opportunity of contesting claims filed in the proceedings.

2o. That the lengthy contestations arising out of the overbid made to the price of sale by an opposing creditor to the proceeding for a ratification, and the delays consequent upon the contestations of oppositions, have not the effect of discharging the purchaser from the payment of interest upon the purchase money, which interest becomes payable after the lapse of the four months for giving the public notice necessary for obtaining letters of ratification; and which interest he is only bound to pay up to the day of the payment of the money into court although at that period the contestations had not been disposed of.

3o. That the omission of some of the formalities required by the Provincial Statute of the 9th Geo. IV, cap. 20, to be admitted to overbid upon the price of sale, does not entail a nullity of the proceeding.

Ruston vs. Blanchard.

390

REGISTRATION—*Vide Tutorship.*

REGISTRATION.—*Right of cutting Timber.*

1 Held:—That a purchaser who has registered his title deed cannot be bound to suffer a *coupe de bois* to which the property has been subjected, and the title whereof was not registered, although the purchaser had a knowledge of its existence.

Thibeault vs. Dupré.

393

Of Donation.

2 Held:—That under the 4th Section of the Registry Ordinance, 4th Vict., ch. 30, the Defendants, *dona-taires* of the land sought by the action to be declared hypothecated, are not purchasers or grantees for or upon valuable consideration, as mentioned in said section, so as to enable them to invoke, as against

pour lui donner l'occasion de contester les réclamations.

2o. Que les longues contestations survenues sur la *surenchère* faite au prix d'achat par un créancier opposant à l'encontre de la demande en ratification, et les délais intervenus sur des oppositions contestées, n'ont pas l'effet de décharger l'acquéreur du paiement des intérêts sur son prix d'achat, lesquels deviennent payables, après les *quatre mois d'avis* préalable à l'obtention du jugement de ratification écoutés; et lesquels intérêts il doit payer jusqu'au jour du dépôt judiciaire, quoiqu'à cette époque les contestations ne fussent pas encore terminées.

3o. Que l'omission de quelques-unes des formalités requises par le Statut Provincial 9ème Geo. IV c. 20 (statut des ratifications) pour parvenir à une *surenchère* du prix d'achat, n'entraîne pas la nullité de la procédure.

*REGISTRATION.—*Right of cutting Timber.**

1 Jugé:—Qu'un acquéreur qui a enregistré son titre ne peut être assujetti à une servitude de coupe de bois imposée sur l'héritage, et dont le titre n'a pas été enregistré, nonobstant la connaissance qu'il pouvait avoir de l'existence de cette servitude.

2 Jugé:—Que sous la 4e section de l'Ordonnance 4e Vict., ch. 30, les Défendeurs, donataires de la terre en raison de laquelle ils étaient poursuivis hypothécairement, n'étaient pas acquéreurs pour ou sur valable considération, tel que mentionné en la dite section, de manière à ce qu'ils pussent invoquer, à l'encontre du

the Plaintiff, the non-Registration of his original *titre de créance*, or the Registration of the judgment founded thereon, subsequent to the insinuation of the donation. That in the case submitted the Defendants were *donataires à titre gratuit*.

Holmes vs. Cartier.

Demandeur, le défaut d'enregistrement de son titre de créance, ou l'inscription du jugement fondé sur tel titre, à une époque subséquente à l'insinuation de la donation. Que dans l'espèce les Défendeurs étaient donataires à titre gratuit.

296

RES JUDICATA.

Held:—That a judgment dismissing an hypothecary action, for want of proof of possession by the Defendant of the property hypothesized, cannot be opposed by exception of *rei judicata*, to a subsequent demand, founded on actual possession, possession being a fact which is renewed day by day.

Nye and Colville.

408

RETURNING OFFICER—*Vide IMPRISONMENT.*

SAISIE-ARRET.

1. Held:—That an affidavit for a Writ of *Saisie Arrêt simple* in which it is alleged, "that Deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, "that the Defendant hath secreted, "and is about to secrete his estate, "debts and effects, with intent &c." is sufficient, and in accordance with the 27th Geo. III, c. 4, sec. 10, and the form given in the 9th Geo. IV, c. 27.

Laing vs. Bresler.

2. Held:—That an affidavit for an attachment, *saisie-arrest*, must be made in the terms and according to the provisions of the 27th Geo. III, c. 4, sec. 10, otherwise such attachment will be quashed.

Leversou vs. Cunningham.

3. Held:—That an affidavit for *Saisie-Arrêt* in which it is said: "That Deponent is credibly informed, hath every reason to believe, and doth verily in his

Jugé:—Qu'une sentence déboustant une action hypothécaire, faute de preuve de la possession du Défendeur de l'immeuble hypothéqué, ne peut soutenir une exception de chose jugée, opposée à une nouvelle demande fondée sur la possession actuelle du Défendeur, la possession étant un fait qui se renouvelle de jour en jour.

408

1. Jugé:—Qu'un affidavit dans lequel il est allégué "que le Déposant est informé d'une manière croyable, à toute raison de croire, "et croit vraiment dans sa conscience, que le Défendeur a récéle, "et est sur le point de récéler ses biens, dettes et effets dans la vue de frauder, etc.," est suffisant, et tel que voulu et requis par le statut 27 Geo. III, c. 4, sec. 10, et la forme donnée dans la 9e Geo. IV, c. 27.

2. Jugé:—Qu'un affidavit pour un writ de saisie-arrest, doit être fait dans les termes et d'après les dispositions de la 27e Geo. III, c. 4, sec. 10, autrement telle saisie-arrest sera déclarée nulle.

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3. Jugé:—Qu'un affidavit pour Saisie-Arrêt dans lequel il est dit: "Que le Déposant est informé d'une manière croyable, à toute raison de croire, et croit vraiment dans

"conscience believe, that the Defendant is immediately about to secrete his estate, debts, and effects, with intent to defraud, &c.," is sufficient.

Wurtelle vs. Price.

214

4. Held:—That an affidavit for *Saisie-Arrêt* in which it is said: "That Deponent hath every reason to believe, and doth verily believe that the Defendants are immediately about to secrete their estate, debts and effects, with intent to defraud, &c.," is insufficient, and not in accordance with the 27th Geo. III, c. 4, or the form prescribed by the 9th Geo. IV, c. 27.

Baile vs. Nelson.

216

5. Held:—That an affidavit for *Saisie-Arrêt simple* in which it is alleged: "that Deponent is credibly informed, and doth verily believe, that the said Defendant is immediately about to secrete his estate, debts and effects, with an intent to defraud, &c.," is insufficient, and not in conformity with the requirements of the Statutes, 27th Geo. III, c. 4, sec. 10, and 9 Geo. IV, c. 27.

Maguire vs. Harvey.

251

6. Held:—That an affidavit for a writ of *Saisie-Arrêt* in which it is stated: "That Deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, &c.," is sufficient, being according to the form laid down in the 9 Geo. IV, c. 27.

Hayes vs. Kelly.

337

7. Held:—That an affidavit for *Saisie-Arrêt* in which it is alleged: "That Deponent is credibly informed, hath every reason to believe, and doth verily in his soul and conscience believe, etc.," is sufficient.

Fitzback vs. Chalifour.

385

"sa conscience, que le Défendeur est sur le point de réceler ses biens, dettes et effets, dans la vue de frauder, etc.," est suffisant.

4. Jugé:—Qu'un affidavit pour *Saisie-Arrêt* dans lequel il est dit: "Que le Déposant a raison de croire, et croit vraiment que les Défendeurs sont sur le point de réceler leurs biens, dettes et effets, dans la vue de frauder, etc.," n'est pas suffisant, et n'est pas conforme aux dispositions de la 27e Geo. III, c. 4, ou la forme prescrite en la 9e Geo. IV, c. 27.

5. Jugé:—Qu'un affidavit pour *Saisie-Arrêt simple* où il est allégué: "Que le Déposant est croyablement informé, et croit vraiment, que le dit Défendeur est sur le point de cacher ses biens, dettes et effets, et ce dans la vue de frauder, &c.," n'est pas suffisant, ni en conformité avec les Statuts, 27 Geo. III, c. 4, sec. 10, et 9 Geo. IV, c. 27.

6. Jugé:—Qu'un affidavit pour *Saisie-Arrêt* dans lequel il est allégué: "Que le Deposant est informé d'une manière croyable, à toute raison de croire, et croit vraiment en sa conscience, etc.," est suffisant, étant suivant la forme prescrite par la 9e Geo. IV, c. 27.

7. Jugé:—Qu'un affidavit pour *Saisie-Arrêt* dans lequel il est dit: "Que le déposant est informé d'une manière croyable, à toute raison de croire, et croit vraiment en sa conscience, etc.," est suffisant.

SALE.—*Certificate of Registration.*

Held:—That an action cannot be maintained by a vendor to recover an instalment due on the *prix de vente*, the deed containing a stipulation that the vendor should furnish to the purchaser, before payment of the instalment, a certificate from the Registrar of the County within which the land is situated that there are no mortgages or incumbrances on the land, and there being no proof that such certificate was furnished: notwithstanding proof adduced with the Plaintiff's answers to the pleas, of a notarial receipt, not registered, dated previous to the sale, discharging the mortgage or *bailleur de fonds* claim alleged by the Defendant's pleas to exist on the land in question.

Jugé:—Qu'une action ne peut être maintenue par un vendeur contre un acquéreur pour le recouvrement d'un instalement dû sur un *prix de vente*, l'acte contenant une clause qui oblige le vendeur de fournir à l'acquéreur, avant le paiement de l'installement, un certificat du Registrateur du Comté dans lequel l'immeuble est situé, qu'il n'existe aucune charge ou hypothèque sur la propriété, s'il n'est prouvé que tel certificat a été produit: et quoiqu'il soit prouvé par une quittance notariée, non enregistrée, antérieure à la vente, produite avec les réponses du Demandeur aux défenses du Défendeur, que l'hypothèque ou privilége de bailleur de fonds allégué par les plaidoyers du Défendeur exister sur l'immeuble, est éteinte.

Bunker vs. Carter.

291

SALVAGE.

1o. Salvage. A vessel struck on Red Island shoal in the River St. Lawrence, at the end of November, 1853, and being abandoned by the crew, was subsequently carried off by the ebb tide. She was followed by four young men, who with great perseverance, courage and skill, and with great peril of their lives, forced their boat through the ice, and got on board and brought her back to the bay of Tadousac, where she remained in safety during the winter, and until she proceeded on her voyage in the following spring. On a value of £3000 currency, the Court awarded £500 currency and costs.

2o. Rule laid down by the Court respecting the production of protests, viz: that in all cases of salvage they ought to be brought in.

1o Sauvetage. Un vaisseau échoua sur les battures de l'Isle Rouge dans le fleuve St. Laurent, à la fin de Novembre, 1853, et ayant été abandonné par l'équipage, fut subseqüemment emporté par les glaces au reflux, et fut suivi par quatre jeunes gens, qui avec beaucoup de persévérance, de courage et d'adresse, et au grand péril de leur vie, forcèrent leur chaloupe à travers les glaces, s'embarquèrent et ramenèrent le vaisseau à la baie de Tadousac, où il resta en sûreté pendant l'hiver, et jusqu'au printemps, lorsqu'il fit voile pour sa destination. Sur la valeur de £3000 courant, la Cour donna £500 courant et les dépens.

2o. Règle établie par la Cour relativement à la production des protest, savoir: que dans les poursuites pour sauvetage tels protêts devraient être produits.

Electric.

53

SECURITY FOR COSTS—*Vide Pleadings.*SEIZURE—*Vide Guardian.*

SEIZURE OF BOOKS OF ACCOUNT—

Vide Books of Account.

SERVICE OF PROCESS ON INCORPORATED COMPANIES.

Held:—That in an action on Insurance Policies, issued in Upper Canada, service in Montreal, at the Defendants' agency there, of process against an Insurance Company incorporated and having its chief place of business in Upper Canada, is not sufficient; the agent, on whom process was served, not having charge of an office belonging to the Company for the transaction of its business generally, and without limitation.

Jugé:—Que dans une action fondée sur une Police d'Assurance faite dans le Haut-Canada, signification du writ à Montréal, sur l'agent des Défendeurs, Compagnie d'Assurance incorporée et dont le chef-lieu des affaires est dans le Haut-Canada, est insuffisante; l'agent, sur lequel la signification avait été faite, ne tenant pas un bureau appartenant à la Compagnie pour transiger généralement toutes ses affaires, et sans restrictions.

Macpherson vs. St. Lawrence Inland Marine Insurance Company. 403

SERVITUDE—*Vide Registration.*SHIP BUILDING.—*Advances, account, commission.*

In an action to account, on an agreement by a party to advance monies for the building of a ship, to be reimbursed out of the proceeds of the sale of the said ship (which such party is authorized to send to his friends in Liverpool or London, and for that purpose to appoint and substitute attorneys or agents), together with all expenses and charges attending such sale, and also a commission of five per cent:

Held:—1o. That such account need not be in the form of a *compte de tutelle*, and may be made in the usual commercial form.

2o. That the party making advances, over and above his commission of 5 per cent, is entitled to charge the commission of his attorneys or agents in England who effected the sale of the ship, at 4 per cent, which is proved to be the usual charge, and which is payable on the whole price of the sale made at credit, although part was paid

Dans une demande en reddition de compte, sur une convention par une partie d'avancer les fonds nécessaires pour la construction d'un navire, à être remboursés sur le prix de ce navire (que cette partie était autorisée à envoyer à ses amis à Liverpool ou à Londres, et de nommer à cet effet des sous-agents et substituts), avec tous les frais et charges pour parvenir à la vente, et en sus une commission de cinq pour cent sur les avances:

Jugé:—1o. Qu'il n'est pas nécessaire que tel compte soit revêtu de toutes les formalités d'un compte de tutelle, et peut être fait dans la forme ordinaire.

2o. Que la partie a droit, en sus de sa susdite commission, de charger celle des sous-agents qui ont effectué la vente en Angleterre, portée à 4 pour cent, et prouvée être la commission ordinaire, qui est exigible sur tout le prix de la vente qui était faite à crédit, quoique partie en ait été reçue quelques jours seulement après telle vente;

within a few days after the transaction ; and also a Bank Commission of $\frac{1}{4}$ per cent charged by the sub-agent, and which is usual in England on similar transactions.

3o. That the said party is not liable by reason of the bankruptcy of his substitutes for monies due by them ; and that the principal is to bear such loss, inasmuch as, under the circumstances, the substitutes were his own attorneys and agents ; there being no evidence that the agent was not justifiable in appointing the said sub-agents.

Symes and Lampeon.

17

SLANDER, PROOF OF.

In an action on the case for slander, one witness proved that the Defendant, speaking of the Plaintiff, had used the word, "whore," and said, that "she had been kept by a gentleman," whose name the witness gave ; and a second witness proved, that the Defendant, on a different occasion, speaking of the Plaintiff, had said : "she has been frequently seen in the company of a gentleman," mentioning the same name as that sworn to by the witness.

Held :—1o. That there was not sufficient proof to warrant a verdict for the Plaintiff, and that the testimony of the second witness was not corroborative of the evidence of the first ;

2o. That a communication by a merchant to his clerk, in his private office, affecting the character of a third person, made in the course of a conversation occasioned by the absence from his duties of another clerk of the merchant, is a privileged communication.

Ferguson vs. Gilmour.

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SOLIDARITÉ—*Vide ERASURES.*

STEAMBOAT OWNERS—*Vide CARRIERS.*

TENDER—*Vide CURRENCY.*

aussi une Commission de Banque de $\frac{1}{4}$ par cent, prouvé être usitée en Angleterre dans ces sortes de transactions.

3o. Que cet agent n'est pas responsable par suite de la faillite du sous-agent ou son substitut, des derniers que ce dernier pouvait avoir entre ses mains appartenant au mandant ; que ce dernier en doit supporter la perte, le sous-agent étant son préposé d'après l'autorisation sus-mentionnée ; la preuve n'établissant aucunement que l'agent n'était pas justifiable de nommer ce substitut.

Dans une action pour diffamation, un témoin prouva que le Défendeur en parlant de la Demanderesse s'était servi du mot "putain," et avait dit "qu'elle avait été entretenue par un monsieur," que le témoin nomma ; et un second témoin prouva que le Défendeur, dans une autre occasion en parlant encore de la Demanderesse avait dit : "elle a été fréquemment vue avec un monsieur," nommant la même personne que le premier témoin avait indiquée dans son témoignage.

Jugé :—1o. Que cette preuve n'était pas suffisante pour soutenir le verdict du jury en faveur de la Demanderesse, et que le témoignage du second témoin ne corrobore pas le témoignage du premier ;

2o. Qu'une communication par un marchand à son commis, faite dans son comptoir, affectant le caractère d'une tierce personne, dans une conversation occasionnée par l'absence d'un autre commis de ce marchand, est une communication privilégiée.

TUTORSHIP.

1. Held:—1o. That in Lower Canada, the tutorship is *dative* and conferred by the judge, and not by the advice of the relations, which is only a mode of inquiry to aid the judge in the exercise of this attribute.

2o. That a *tutelle* is not *de facto* null, by reason of one of the grand fathers not having been called to the meeting of the relations, and that the said *tutelle* ought not to be set aside, if the interests of the minors be not affected by such omission.

3o. That the *tutelle* must be conferred by the judge of the last domicil of the deceased father, which domicil continues that of the minors.

4o. That, in the present instance, the father had continued his domicil in the district of Montreal, although he had latterly resided in another, and died abroad.

5o. That in the event of two *tutelles* being conferred in two distinct jurisdictions, the Court called to adjudicate upon the one conferred in its jurisdiction, may and is bound equally to pronounce upon the validity of the other, if the same is brought into question.

Beaudet and Dunn.

2 Held:—That an opposition to the sale of real estate by a *Tutor ad hoc*, authorized to act for minors, is maintainable without registration of such *Acte de Tutelle*, and that the 24th section of the registry ordinance, 4th Vict. Ch. 30, does not apply to such oppositions.

Chouinard vs. Demers.

Inventory, Action of Account, Nullity of settlement of Account.

3. Held:—1o. That so long as a first tutorship exists, a second cannot take place, and that acts made by a second tutor are null;

1 Juge:—1o. Que dans le Bas-Canada, la tutelle est dative et conférée par le juge, et non par l'avis de parents, qui n'est qu'un mode d'enquête pour aider le juge dans l'exercice de cette attribution.

2o. Qu'une tutelle n'est pas nulle de plein droit, à raison de ce qu'un des aïeuls des mineurs n'a pas été appelé à l'assemblée des parents, et qu'elle ne doit pas être mise de côté, si l'intérêt des mineurs n'est pas affecté par suite de cette omission.

3o. Que la tutelle doit être déclarée par le juge du dernier domicile du père décédé, lequel domicile reste celui des mineurs.

4o. Que, dans l'espèce, le père avait conservé son domicile dans le district de Montréal, quoiqu'il eût résidé en dernier lieu dans un autre district, et fût décédé à l'étranger.

5o. Que, dans le cas de deux tutelles en deux juridictions différentes, le tribunal appelé à prononcer sur celle qui a eu lieu dans sa juridiction, peut et doit également prononcer sur la validité de l'autre, si elle est mise en question.

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Registration of.

2 Jugé:—Qu'une opposition à une vente d'immeubles faite par un *Tuteur ad hoc*, autorisé à agir pour des mineurs, doit être maintenue, nonobstant le défaut d'enregistrement de l'*Acte de Tutelle*, et que la 24me section de la 4me Vict. Ch. 30, n'est pas applicable à telles oppositions.

401

3. Jugé:—1o. Que tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et que tous les actes faits par un second tuteur sont nuls;

2o. That an inventory made without calling in the first tutor is null;

3o. That if the *subrogé tuteur* who has appeared at an inventory, is still a minor, the inventory is null;

4o. That the bailiff who has estimated the chattels mentioned in the inventory, must be sworn, if not, the inventory is null;

5o. That inaccuracies, false valuations, omissions in an inventory make it void, and render the one who has made it guilty of fraud;

6o. That all transactions, acquisitions and discharges which have taken place between a tutor and minors who have become of age, founded upon such incorrect and fraudulent inventory, are null *de plano*;

7o. That transactions which have taken place between a tutor and minors who have become of age, without a faithful inventory being made, without accounts being rendered and without production of vouchers, are void *de plano*;

8o. That the action *rescissoire*, in such a case, is not prescribed by ten years, when there is deceit and fraud;

9o. When there is an absence of registration, the civil *status* of a person can be proved by the sayings of his parents and by witnesses;

Motz vs. Moreau.

2o. Qu'un inventaire fait sans y appeler le premier tuteur est nul;

3o. Que si le subrogé-tuteur qui a comparu à tel inventaire, est encore mineur, l'inventaire est nul;

4o. Que l'huissier qui a prisé les effets portés à l'inventaire, doit être asservement, à peine de nullité de l'inventaire;

5o. Que des inexactitudes, de fausses évaluations, des récels dans un inventaire, le rendent nul, et constituent en fraude celui qui l'a fait;

6o. Que toutes transactions, quitances et décharges intervenues entre tel tuteur et des mineurs devenus majeurs, ayant pour base tel inventaire incorrect et frauduleux, sont nulles de plein droit;

7o. Que des transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de comptes et sans productions de pièces justificatives, sont nulles de plein droit;

8o. Que l'action rescissoire, dans pareil cas, ne se prescrit pas par dix ans, lorsqu'il y a dol et fraude;

9o. Qu'en l'absence de registres, l'état civil d'une personne peut être prouvé par les dires de ses parents et par témoins.

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VENDOR AND VENDEE—*Vide Ratification.*

VENTILATION—*Vide Ratification.*

WAGES OF SEAMEN.

Held:—That freight is the mother of wages, and that if during a voyage the vessel becomes a total loss the seamen cannot recover wages, and that consequently the liability of a third party to pay them their wages will cease.

Bernier and Langlois.

Jugé:—Que les matelots n'ont droit à des gages que quand le vaisseau a gagné du fret, et que si durant le voyage le vaisseau est totalement perdu les matelots n'ont point droit à leur salaire, et que dans tel cas l'obligation contractée par un tiers de payer les gages est éteinte.

425

WAY, RIGHT OF.

Held:—That the undertaking of a party in a deed of partition, to suffer a road-way upon his portion of land, and to make and macadamize the same to the extent of thirty feet in width, is a *servitude et charge réelle* for the preservation of which the party in whose favor it is stipulated, has a right to make an opposition *afin de charge* upon a judicial sale of the property.

Murray and Macpherson.

359

Jugé:—Que l'obligation par une partie, en un partage, de laisser un chemin sur sa portion de terre, et d'y faire et macadamiser une voie de trente pieds de largeur, est une servitude et charge réelle, pour l'exécution de laquelle la partie, en faveur de qui elle est stipulée, peut se pourvoir par opposition *afin de charge* sur décret forcé.

Held:—That the Plaintiff, under the clause of the will recited in the declaration, was not entitled to the sum of money sought to be recovered by the action, and that a bequest (on a contingency mentioned) giving her the power of disposing of the sum by will, does not vest the sum in her absolutely as proprietor.

McGillivray vs. Gerrard.

401

WILL.—*Legacy.*

Jugé:—Que la Demandante, en vertu de la disposition du testament allégué dans la déclaration, n'était pas en droit de réclamer la somme mentionnée en la dite déclaration, et qu'un legs (avec condition suspensive) lui donnant le droit de disposer par testament de la somme en question, ne la constituait pas propriétaire absolue de cette somme.

WILL, VALIDITY OF.

Held:—1o. That a bequest in trust is valid in Lower Canada.

2o. That it is not necessary in a will that the words *lu et relu* be expressed, if it be apparent by the context that this formality was observed as required by law.

3o. That in this instance, the Respondent having taken possession of the estate of the testator under the will appointing him executor, the Appellant, heiress at law of the testator, could not claim the estate by reason of the Respondent having so taken possession, without a previous *demande en délivrance de legs*, and that such a *demande en délivrance de legs*, by the executor, after his taking possession, more than a year after the testator's death was properly made.

Freligh and Seymour.

492

Jugé:—1o. Qu'un legs fiduciaire est valide dans le Bas-Canada.

2o. Que dans un testament l'omission des mots *lu et relu* n'est pas une nullité absolue, et ne peut invalider l'acte, s'il appert du reste que cette formalité a été observée tel que requis par la loi.

3o. Que, dans l'espèce, l'Intimé ayant pris possession des biens de la succession, en vertu du testament qui le constituait exécuteur, l'Appelante, héritière légale du testateur, ne peut revendiquer les biens à raison de cette prise de possession, non précédée d'une demande en délivrance de legs, et que cette demande en délivrance de legs portée par l'exécuteur, après cette prise de possession, et plus d'un an après le décès du testateur, a été bien portée.

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